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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL,

Petitioner,

v

OSCAR MAUZY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First Question:

In refusing to disqualify itself or any of its members, did the Texas Supreme Court deprive petitioner of a tribunal that was fair and impartial, either in fact or in appearance:

(1) Was petitioner provided with a constitutionally acceptable tribunal:

a. Where the record reflects that the opposing party is a member of the tribunal before which the case is pending;

b. Where the record reflects that petitioner was a member of the minority political party, a lower court judge, a repeat candidate for election to the court considering the case, variously described as a perennial candidate, a controversial judge, and a maverick personality;

c. Where the record reflects that the justices presiding in the case were petitioner's past and present political opponents, where those justices had been embroiled with petitioner in prior and pending litigation, and where petitioner had publicly directed against those justices, during the course of his political campaigns, pointed and barbed criticism; and

d. Where the record reflects that several of the justices participating in the decision had, themselves committed the same alleged acts or

omissions (campaign finance reporting violations) being charged by petitioner against the opposing party to the case?

(2) Should not the writ be granted to clarify the following corollary questions?

a. Shouldn't the Court adopt a single unified test of constitutional disqualification: *Are the circumstances such as to offer a temptation to the judge not to hold the balance nice, clear and true?*

b. Shouldn't the 3-Justice concurrences in *Aetna v. Lavoie*, 475 US 813 (86), be adopted as a rule of law? If so, do those concurrences not control this case?

c. Shouldn't this Court reject the *Lavoie* dicta indicating that the disqualification of state judges under the Fourteenth Amendment might be limited only to cases where the challenged judge has an economic interest to be served by his rulings?

(i) If such *Lavoie* dicta be correct, has petitioner not shown sufficient economic interest in the Texas Supreme Court and its justices to trigger Fourteenth Amendment disqualification?

d. Even though this Court placed heavy reliance upon a federal statute, was not the decision in *Liljeberg v. Health Services*, — US —, 108 SCT 2194 (88), of constitutional

dimension?

(i) If so, is there any basis for applying differing constitutional tests of disqualification to state and federal judges?

(ii) If so, must *Liljeberg* not be read as a limitation upon the dicta of *Lavoie?*

(iii) If so, is petitioner's case not governed by the *Liljeberg* rule holding that inquiry concerning judicial disqualification must primarily concentrate upon the appearance of fairness and impartiality so as to promote public faith and confidence in the judiciary?

(3) Can it seriously be held that NOT ONE of the Texas justices was subject to such an appearance of lack of fairness and impartiality as to require his disqualification?

Second Question:

As applied to this case, does not the Texas Rule of Four, providing that a case will not be formally considered on its merits, unless at least four justices of the Texas Supreme Court affirmatively vote to do so, place a discriminatory burden on a party whenever one or more justices fail to participate in the writ conference?

(1) Was the said Rule of Four, as applied in the instant case, not an unreasoned distinction upon the right of appellate recourse, and therefore violative of the 14th Amendment?

(2) In other words, considering the fact that two justices removed themselves from petitioner's case, and considering that the Texas Supreme Court refused to grant relief from the Rule of Four and considering that petitioner was therefore required to obtain four votes of seven (or 57%) in order to obtain review of his case, whereas the ordinary petitioner need only obtain four votes of nine (or 44%) to obtain review, was a constitutionally repugnant burden not placed upon this Petitioner?

PARTIES

Charles Ben Howell, the sole petitioner before the Supreme Court, was the petitioner, the appellant and the plaintiff in the respective courts below. Respondents, appellees and defendants below were Oscar Mauzy; Oscar Mauzy, P.C.; Oscar Mauzy Personal Private Individual Fund; Senator Oscar Mauzy Birthday Party 1984 Fund, Anne Mauzy, Treasurer; Senator Oscar Mauzy Birthday Party 1985 Fund, Anne Mauzy, Treasurer; Oscar H. Mauzy, State Senator, Dist. 23 Fund, Anne Mauzy, Treasurer; and Oscar H. Mauzy Office Held: State Senator, Office Sought: Justice, The Supreme Court of Texas, Place 1 Fund, Oscar Mauzy, Treasurer.

The case was initiated in the 353rd District Court of Travis County, Texas, cause no. 406,958 where a summary judgment was entered denying all relief sought by petitioner. An appeal was prosecuted to the Texas Court of Appeals for the Third District at Austin, no. 3-88-181-CV which court again denied all relief sought by petitioner and dismissed the appeal. Petitioner applied to the Supreme Court of Texas for a writ of error. That court overruled all motions filed by petitioner and denied his application for writ of error.

The case name in the courts below was the same as the case name being used in this Court.[1]

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[1]Under the ordinary practice where, as here, the Texas Supreme Court denies a writ of error, petitioner's writ of certiorari should be addressed to the Texas Court of Appeals which issued a decision in the case. However, this petitioner complains of the action of the Texas Supreme Court in refusing to grant his motions for disqualification and related motions. It follows that the writ should be addressed to the Texas Supreme Court rather than the Texas Court of Appeals. Burns v. OH, 360 US 252 (59); Stern, G & S, S. CT. PRAC., §6.21 (86 ed.).

If petitioner is mistaken, he prays, in the alternative, that a writ of certiorari be issued to the Texas Court of Appeals for the Third District of Texas at Austin.

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APPENDIX INDEX

CITATIONS

Statutes and Rules:

Articles:

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OPINION BELOW

In connection with its rulings, of which petitioner here complains, in refusing to disqualify any of its members (PA 6-8)[2] in response to timely and specific motions by petitioner (PA 11-15, 72-87), the Texas Supreme Court issued no opinion or any other explanation, written or oral, explaining its actions. Petitioner does not consider the opinion of the Texas Court of Appeals (PA 2-6), published at 774 SW2d 274, to be relevant to any of the issues raised herein.

JURISDICTION

Petitioner complains of judgments and orders of the Texas Supreme Court dated October 18, and November 8 and 15, 1989 (PA 6-8), the court denying the writ on October 18. *How federal question was presented:* In addressing his motion for disqualification to the Texas Supreme Court, petitioner expressly relied upon "the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution" (PA 11,2,3) By his "Motions Precedent," petitioner urged that the court's "Rule of Four," as applied to petitioner's case was a "discriminatory burden . . . in violation of the Due Process and Equal Protection Clauses" of the 14th Amendment to the US Constitution (PA 62,3,6-7). In his motion for rehearing to the said court, petitioner urged, *inter alia*, that he had been deprived of "Due Process of Law and Equal Protection of the Law guaranteed to petitioner under the Fourteenth Amendment to the United States Constitution" to be heard by a tribunal, fair and impartial both in appearance and in fact

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[2]In referring to the proceedings below, petitioner will employ the following abbreviations: (PA)—Petitioner's Appendix attached to this petition; (R)—record of the trial court; (R/TXSCT)—record of proceedings before the Texas Supreme Court.

Unless otherwise indicated, all emphasis has been added.

(R/TXSCT, points, filed 03NV89). Petitioner further urged that the overruler of his "Motions Precedent" was violative of the federal constitution (R/TXSCT, points 15-31). Where the constitutional error originates in the state's highest court, the error is sufficiently preserved if addressed in a petition (motion) for rehearing in that court. *Brinkerhoff-Faris v. Hill*, 281 US 673,7-8 (30); Stern, G & S, S. CT. PRAC. §3.21. Rehearing was denied on November 8, 1989 (PA 7). Extension until March 5 was granted January 29, 1990. A-539. Jurisdictional statute: 28 USC §1257(3).

COURT RULES INVOLVED

Texas Rules of Appellate Procedure:
Rule 15.

(a) Within thirty days after the filing of a proceeding in a court of appeals, the Supreme Court, or the Court of Criminal Appeals, any party may file with the clerk of the court a motion stating grounds why a justice or judge before whom the case is pending should not sit in the case. The court shall allow the filing of a motion after the expiration of thirty days if the motion is grounded upon reasons not known within the thirty day period and upon a showing of good cause.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice or judge ten days after the filing of such motion unless otherwise ordered by the justice or judge. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the

entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

(d) to the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.

Rule 15a.

(1)(1(1) Disqualification

Appellate judges shall disqualify themselves in all proceedings in which:

> (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law (except in the context of a district or county attorneys office) served during such association as a lawyer concerning the matter; or
>
> (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
> (c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) Recusal

Appellate judges should recuse themselves in proceedings in

which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
(Adopted by Supreme Court order of July 15, 1987, eff. Jan. 1, 1988.)

STATEMENT OF THE CASE[3]

For the purposes of this petition, the underlying lawsuit was adequately described by the Texas Court of Appeals (PA 2-3). The trial court sustained respondent's motions in full and denied all relief sought by petitioner (R."B"-442,5,9). Appeal was taken to the Texas Court of Appeals which dismissed the appeal on the premise that respondent's attorney's fee claims had not been fully disposed. Sensing that the opinion was framed so that the trial court might interpret it as constituting an implicit invitation to assess attorney's fees against petitioner so oppressive that petitioner could not afford to further prosecute the litigation, petitioner sought a writ of error from the Texas Supreme Court.

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[3]Petitioner has previously urged the disqualification of the Texas Supreme Court without success. Howell v. Homecraft, – US –, 109 SCT 1124, cert den, sum 57 USLW 3491 (no. 88-923 21FE89). In Homecraft, as here, the Texas Supreme Court refused to deliver any opinion or make any findings with respect to petitioner's motions seeking disqualification; Howell v. Homecraft, decided w/no opn. 31 TXSCTJ 340 (TXSM 88).

Petitioner urges that the case at hand is an even stronger case for disqualification than Homecraft: (1) This action is against an incumbent member of the challenged court. If as urged herein, one of the primary objectives of disqualification proceedings is to preserve public confidence in the judiciary, cases in which a member of the very tribunal in question is a litigant are of particular importance. (2) Petitioner has gained additional evidence of the Chief Justice's disqualification (See topic, "Chief Justice Phillips Was Clearly Disqualified"). (3) Also, during the 17 months following the overruler of the Homecraft motion, another election campaign took place producing significant additional grounds for disqualification (PA 16,25-39;49-50).

Also, at the date of this writing, a Homecraft spin-off was pending before this Court. Howell v. SCT, – US – (no. 89-1035 cert., filed 12FE90); See Howell v SCT, 885 F2d 308 (5-TX 89). Because of overlapping facts and questions of law, the writ should be granted in both cases and the cases argued in tandem.

Within the thirty-day period provided by TXRAP 15 and before any ruling by the higher court, petitioner filed his motion for disqualification with that court (PA 11-13). It was supported by affidavit (PA 16-39) and verified exhibits (PA 39-59). Those instruments are extensively abstracted in the appendix, they will be summarized here but briefly.

Beginning in days when, in Texas "Republican" was an epithet, petitioner was a many-time candidate for judicial office on the Republican ballot. He was finally elected and re-elected as a trial judge; subsequently, he was elected to the Court of Appeals. In 1986, while continuing to hold office on the intermediate court, he was a candidate for the Supreme Court, which was then an all-Democrat bastion.

He attempted to run against Justice Wallace, but as the result of a suit filed by Justice Wallace, petitioner was forced to run against now-Justice Mauzy. *Wallace v. Howell*, 707 SW2d 876 (TXSM 86). Believing that action to be contrary to the Constitution and laws of the United States, petitioner hailed the entire membership of the Texas Supreme Court into federal district court; such case was non-suited when electoral developments made it, pragmatically speaking, moot. The subsequent race against now-Justice Mauzy produced the within lawsuit against respondent Mauzy and a companion suit against respondent Mauzy and his wife, both containing extensive allegations of campaign finance violations.

Failing election by a small margin in 1986, petitioner began laying plans for another race in 1988; he formally announced for Justice Gonzalez's seat on December 8, 1987. In early January, petitioner became engaged in heated rivalry with the governor's recent appointees to the court, Chief Justice Phillips and Justice Culver, over a place

on the primary election ballot. On October 5, 1989, when petitioner filed his disqualification motion, four of the nine justices were past and present political rivals.

There is more to the story. As he ran for a seat on the state's highest court, petitioner mounted numerous broad based attacks upon the entire membership of the curt, for breaches of decorum, and for a seeming want of integrity. When the court refused to accept the highly publicized Texaco-Pennzoil litigation for argument, petitioner contended to the media that "[T]he judges copped out in favor of their pocketbooks" (PA 16,26;49). As detailed in the appendix, petitioner's political efforts had created a situation where every member of the court had repeated occasion to take umbrage at petitioner's remarks, albeit that those remarks were factually well supported and well within the limits of acceptable campaign tactics.

Among other matters detailed in the appendix, petitioner developed that the Chief Justice had personally and financially supported petitioner's 1986 primary election opponent, Justice Hecht. Justice Hecht stood down in the instant case (PA 6-7), but the Chief Justice refused to do so (PA 9). Justice Gonzalez widely denounced petitioner as a "kook." When petitioner went on television with a sign "Judge Kook" around his neck as a parody of Justice Gonzalez's epithet, Judge Cook became irate over the prospect of public confusion between the names "Cook" and "Kook" (PA 37-8). Each respondent justice was, on the date that he refused to disqualify, a defendant in *Howell v SCT*, then pending on appeal to the Fifth Circuit(see fn. 3 *supra).* In addition, four justices had arguably committed the same campaign reporting violations as respondent Mauzy (PA 72-87; also fn. 4).

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Of the nine justices, Justices Mauzy and Hecht did not participate in the decision below. The seven remaining justices rejected petitioner's challenges (PA 6) and proceeded to dispose of the case. All of petitioner's challenges were rejected without discussion and the writ was denied. The Court successively met en banc to determine if any justice should be required to step down. *See* TXRAP 15. The conclusion: *none of the seven* was disqualified.[4] Necessarily, any appearance of fairness and impartiality was thin indeed.[5]

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[4]We further draw attention to petitioner's supplemental motion for disqualification wherein petitioner presented that Justices Spears, Ray, Gonzalez and Doggett had engaged in some of the identical campaign reporting violations that were alleged against respondent Mauzy, to-wit: failure to itemize thousands of dollars in credit card charges, failure to itemize large advan es and/or expenditures for travel, entertainment, etc., and the diversion of campaign contributions to personal use ("pocketing") (PA 72-87). Certainly, a judge who has personally engaged in arguably similar campaign reporting violations should be disqualified.

Petitioner recognizes that the court below refused to consider the supplement on grounds of untimeliness. However, the Supreme Court should pass on the question of whether the court below erred in doing so for two reasons: (1) the overriding public interest in the appearance of judicial integrity requires that the untimeliness be waived. Aetna v Lavoie, 475 US 813 (86); Liljeberg v. Health Services, – US –, 108 SCT 2194 (88). (2) Additionally, Texas law provides that the act of a disqualified judge is void and may be attacked at any time. Nalle v Austin, 22 SW 960 (1893) Buckholtz Ind Schools v Glaser, 632 SW2d 142,6 (82)

Alternatively, the decision of the Texas Supreme Court should be vacated with a request that the court below enter further findings.

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[5]Any contention that the continued service of any justice was a matter of necessity cannot be supported. The Texas Constitution makes provision for the appointment of special justices wherever the court or any member thereof is disqualified. TXCONST art. V, §11.

It is remarkable that within six days after denying a writ of error to petitioner in Homecraft, the chief justice certified to the governor his disqualification in another case (PA 60). The grounds: that his former law firm had been retained in the case while the chief justice was still in practice with that firm. There was no indication that the chief justice ever knew that his 200 man firm had even been consulted regarding the case. Nevertheless, he declared to a newspaper that "I had to get out" (PA 61-2). The standardless sweep, the erratic approach that theat at the Texas Supreme Court has adopted with respect to the problem of judicial disqualification, is manifest.

REASONS FOR GRANTING THE WRIT

First Question—Summary of Argument:

(1) The constitutional tests for measuring judicial disqualification have been extended and interpreted beyond recognition. It is time for the Supreme Court to cease talking in terms of disqualification for bias and prejudice, in terms of direct pecuniary interest, in terms of "his own case," and the like. Through repeated interpretation, such concepts have become unrecognizable and unworkable.

Sixty years ago, Chief Justice Taft and a unanimous court formulated a due process test for disqualification, quoted many times since, by inquiring if the circumstances were such as to offer a temptation not to hold the balance nice, clear and true. It is time to adopt such true-balance test as the single unified test of due process disqualificationes as to the judge's statements and attitudes, as to possible economic benefit or to his relation to the case as complainant, witness, prosecutor, etc., along with any other factors that might motivate him not to follow the law and the evidence, should be viewed as sub-tests or merely evidence to be weighed in connection with the true-balance test and not as independent tests of disqualification.

(2) As a lesser alternative, the Court should adopt the views of the three separately concurring justices in *Aetna v. Lavoie*, 475 US 813 (86), that the disqualification of a single member of a multi-member tribunal infects the entire decision. There is ample evidence of "direct pecuniary interest," as expansively defined in *Lavoie* on the part of at least one or more Texas justices requiring reversal.

(3) As a further alternative, petitioner urges that

an appellate court be viewed as a unit and that comparative rectitude be applied.

The Supreme Court's Most Recent Decisions Demonstrate that the Writ Should be Granted:

During the past two and one-half years, this Court has issued two pioneering decisions:

(1) *Aetna v. Lavoie*, 475 US 813 (86) (justice of Alabama Supreme Court disqualified—the case *sub judice* could establish precedent valuable to him in his unrelated personal lawsuit), was the first time that the United States Supreme Court ever passed on a claim of appellate disqualification.

(2) *Liljeberg v. Health Services*, — US —, 108 SCT 2194 (88) (federal district court judge was college trustee, his ruling in case could enhance value of college land; HELD disqualified even though college not a party and judge not aware of college's tangential benefit), was the first instance since 1921 where the Supreme Court held a federal judge disqualified. *See Berger v. US*, 255 US 22 (21).

Both cases present problems of interpretation. When interpreted in light of the interest in safeguarding a fair and impartial tribunal, they demonstrate error in the action of the court below.

The Problems with *Lavoie:* (1) The narrow view that the majority took of the 14th Amendment right to a fair and impartial tribunal; (2) The declaration intimating that it is still an open question whether the amendment extends to state courts unless a "pecuniary" interest is involved; (3) The definition of "direct . . . [and] pecuniary" interest; (4) The

definition of "his own case"; (5) Whether the Court should adopt the three-judge concurrence that the disqualification of one member of a multi-member tribunal infects the decision of the entire court. If so, the petitioner's burden is much lightened.

The major problem with *Liljeberg:* Is the decision of constitutional proportion? If so, does it not cast doubt upon the restrictive language of *Lavoie?*

The *Lavoie* View of Disqualification Cannot be Squared with Other Authorities:

Petitioner applauds *Lavoie*'s result. He questions the opinion's unnecessary language. Part III-A opines the ABA Code provision, calling for disqualification for bias or prejudice, "would not be sufficient basis" to trigger due process disqualification. It then states that the Due Process Clause only protects fundamental rights. OF COURSE!! It is axiomatic that the Constitution only sets the outer limits within which government must operate. The right to a fair and impartial tribunal has long been recognized as fundamental; the debate continues with respect to those situations which traverse that right. The opinion then qualifies the statement just quoted by declaring that "we need not decide" if bias would ever be a sufficient due process challenge and then further qualifies itself by stating that "certainly" only extreme cases of bias would offend due process. Obviously, everything in part III-A was pure dicta.

The only stated basis for such dicta was authority over 40 years old. The more modern authorities are discussed below. Even so, such dicta might be accurate if limited to *Berger*-type situations based upon a judicial display of actual animus. Decisions since *Berger* have uniformly held to strict

standards and the vast majority have failed.

The principal shortcoming in the entire opinion is the attempt to pigeon-hole every case as either a display-of-animus challenge or as a challenge for "direct pecuniary interest." NOT SO!! Uncounted situations severely question a judge's impartiality without any display of animus, without his pocketbook ever having been involved. *Liljeberg* belongs in such third category. Petitioner's challenges to certain of the Texas judges might be so classified. *Lavoie* did not declare this third category beyond due process protection; *Lavoie* simply failed to notice.

In Part III-B, *Lavoie* found disqualification on the grounds that the challenged justice " 'acted as a judge in his own case,' " and also that his interest was " 'direct . . . [and] pecuniary.' " The first test is virtually without substance; the second test has been tortured beyond recognition.

Tumey v. OH, 273 US 510 (27) (disqualifying village mayor compensated as judge of petty offense court by award of costs only if conviction occurred) was the seminal case on constitutional disqualification. HELD the Fourteenth Amendment is offended if the judge has a "direct, personal, substantial, pecuniary interest" *Id.* 523, in the outcome of the case. In *Tumey*, the pecuniary interest was crystal clear. If convicted, the defendant paid $12 costs and the judge-mayor put the money in his pocket. NOT so in *Lavoie which involved at most* a ripple-effect economic gain from the case *sub judice.* Obviously, ripples can be as powerful as a tidal wave. The point, however, is that *Lavoie* has carried the pecuniary interest test beyond the concept of who gets the money adjudged into a field of nebulous inquiry: Does the judge stand to realize a collateral economic gain? In the long run, such inquiry will prove both illusory and unnecessary. *We do*

not need another test for constitutional disqualification. The "true-balance" test, to be discussed momentarily, covers all situations. Tests concerning display of animus, possible economic benefit to the judge, his identification as a witness, complainant or prosecutor, etc., need to be renounced as independent tests; they can be adequately addressed as factors weighing upon the true-balance test.

Tumey did not conclude with the pecuniary interest ruling quoted above. It went on to establish the often quoted true-balance test.[6] The court noted that the mayor had an administrative duty to raise revenues, creating the specter of "a motive to help his village by conviction and a heavy fine." *Id.* 533[7] Clearly, *Tumey* found not one but two grounds for disqualification, (1) pecuniary interest and (2) temptation-not-to-hold-a-true-balance based on the duty to raise revenues.[8] Obviously, the collateral benefit or ripple benefit shown in *Lavoie* would, under *Tumey*, only fit into the second or "true balance" category. By failing to make this distinction,

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[6] Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.
Tumey, 273 US at 532.

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[7] [T]he disqualification of the judge . . . existed both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification.
Id. at 535.

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[8] The fact that Tumey established two grounds of disqualification is confirmed by Dugan v. Ohio, 277 US 61 (1928). There, the Court upheld a conviction imposed by the Mayor of Xenia, Ohio. Chief Justice Taft thought it necessary to emphasize both that "[t]he mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not," 277 US at 65, and that "[t]he mayor has no executive, and exercises only judicial functions." 277 US at 63. The negation of both aspects of Tumey suggests that either would have been sufficient.

Lavoie has inevitably injected confusion into judicial disqualification.

Tumey was the leading authority until *In re Murchison*, 349 US 133 (55) (under Michigan law, judge functioned as one-man grand jury hearing witnesses in secret; HELD grand jury-judge disqualified to hear contempt case arising during grand jury hearings).[9] Since *Murchison*, few disqualification cases *(Lavoie* being no exception) have failed to cite or quote this leading authority.

We submit: (1) Murchison's principal authority was *Tumey;* (2) *Tumey* was considered controlling even without hint of pecuniary interest in the *Murchison* judge; (3) Instead, *Murchison* went off on *Tumey*'s second ground, the true-balance test; and (4) any contention that constitutional grounds for disqualification were limited to judicial-display-of-animus or pecuniary interest was refuted; constitutional disqualification extends to "every" situation traversing the true-balance test.

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[9] A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." [citing Tumey]. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." . . .

. . .A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of the accused. . . . Fair trials are too important a part of our fee society to let the prosecuting judges be trial judges of the charges they prefer.

Murchison, 349 US at 133.

Lavoie cited *Murchison* for its his-own-case ruling. *Id.* 1586. Even in *Murchison*, his-own-case was more metaphoric than real. No matter how much the complaining witness and the prosecutor may refer to a criminal prosecution as "my case," the only proper party to a prosecution is the governing authority. *Murchison* was on sound ground in invoking true-balance and appearance-of-justice, but it was weak on "his own case."

Lavoie illustrates the superfluity of "his own case." The only basis suggested is that the challenged judge stood to reap a "direct" benefit. From the identical facts, *Lavoie* has found two distinct grounds for disqualification, the two theories being, on logic, indistinguishable one from the other. We suggest that *Lavoie* has issued two claim checks for the same hat, two tickets for one bag of laundry.

The clarity of *Murchison* would have been enhanced if it were limited to the true-balance test, the applicability of his-own-case being questionable. In *Lavoie*, his-own-case added nothing but inscrutability. How much better it would have been to apply the true-balance test and omit direct (but collateral, ripple-effect) pecuniary interest and his-own-case-because-he-stood-to-realize-a-large-but-nonetheless-tangential-gain. The Supreme Court will much clarify the law when it adopts true balance as the overriding measure of constitutional disqualification, holding his-own-case and pecuniary benefit only to be factors therein.[10]

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[10]The Ohio mayor's courts were revisited in Ward v. Monroeville, 409 US 57 (72). Inasmuch as the Monroeville mayor was paid a salary, the Supreme Court agreed that the pecuniary interest test was inapplicable, but it nevertheless held the true-balance test to apply. HELD, Inasmuch as the mayor was charged with the duty of raising revenues, he was disqualified to try traffic cases.

Gibson Supports Petitioner:

Gibson v. Berryhill, 411 US 564 (73), is factually close to petitioner Howell's case. The district court had found the board disqualified for bias, and had further found disqualification for financial interest. *See Berryhill v. Gibson*, 331 FS 122,5-6 (3-Judge, NDAL 71). According to the Supreme Court's analysis, the district court framed the inquiry not in terms of actual bias but whether there is a possible temptation to try the case with bias for or against any issue presented." 411 US at 571. In short, *the bias issue was equated with the historic true-balance test.* Financial interest was found in the fact that if the optical goods company were forced to discontinue prescribing lenses, the private practitioner optometrists would fall heir to additional business. Thus, the Supreme Court found "a serious question of a personal financial stake in the matter in controversy was raised." *Id.* 571.[11]

The situation differs but little from the case in bar. Clearly, the members of the Texas Supreme Court harbored bias when that term is defined in accordance with the true-balance test. There was pending litigation between petitioner and all of the court's members. Much campaign rhetoric has been directed against virtually the entire membership of the court. Those members are also petitioner's competitors, political competitors. They strive for the same office. The rise of the minority party threatens the positions of the majority.

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[11] "The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board. Arguably, the District Court was right on both scores, but we need reach, and we affirm, only the latter ground of possible interest.

"It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes [citing Tumey] . . . And Ward . . . indicates that the financial stake need not be as direct or positive as it appeared to be in Tumey." Id. 579-80.

Their jobs are at stake; all members have their pocketbooks on the line with respect to the expense of future elections and the possibility of being defeated for re-election. *Gibson* demands the disqualification of the Texas court.

The entire membership of the Alabama Supreme Court withdrew from the case when a fellow justice was the plaintiff in his own personal injury suit arising out of the justice's untimely collision with a utility pole. *Ex parte Alabama Power Co.*, 196 So2d 702,3 (AL 67). The entire membership of the court also removed itself from the case of *Duncan v. Johnson*, 338 So2d 1343,4n (AL 76) In *Matter of Neely*, 364 SE2d 250 (WV 87), the West Virginia Supreme Court disqualified when it was called upon to consider misconduct allegations concerning one of its members. In *Johnson v. Sturdivant*, 758 SW2d 415 (ARSM 88), the Supreme Court of Arkansas disqualified when one of its members was found to be in litigation with an insurance carrier before the court. Plainly the Supreme Court of Texas is out of step with the national consensus respecting judicial disqualification.

Situations calling for a member of the state's highest court to disqualify are rare. However, questions of disqualification of appellate court judges and justices are especially important because of precept; the justices set an example for all lower court judges. The Texas justices were obligated to do what the Alabama, West Virginia and Arkansas judges did—withdraw in favor of special justices appointed under TXCONST art. V §11. They failed to obey the command of the 14th Amendment and the United States Supreme Court must order them to do so.

Other Cases Do Not Require Proof of Pecuniary Interest as a Pre-Requisite to Disqualification.

Lavoie intimates that the Constitution will not relieve judicial disqualification unless the challenged judge has some direct (but as expansively re-defined) pecuniary interest in the case. *Tumey* does not so hold. *Murchison* is clearly to the contrary. Other cases have found disqualification without a showing of financial interest, certainly not the type described in *Tumey*.

In *Commonwealth v. Continental*, 393 US 145 (68) (arbitrator retroactively held disqualified for failure to disclose extensive consulting services rendered in the past to a party), there was no showing that the challenged judge (arbitrator) had any present or prospective pecuniary interest, direct or indirect, *in the judgment*, the only financial tie to the party being past dealings. The consultant had rendered no services for more than a year. The disqualifying factor was the failure to make affirmative disclosure of facts that would have assisted the offended party to challenge him, the judge-arbitrator, a situation comparable to that of a venireman suppressing information at voir dire. Nevertheless, the disqualification was held to be "a *constitutional* principle." *Id.* 148. Tribunals "not only must be unbiased but also must avoid even the appearance of bias." *Id.* 150.

In *Taylor v. Hayes*, 418 US 488,500-1 (74) (trial judge disqualified to try lawyer for contempt occurring during lengthy criminal trial), the court relied on the *Tumey* "true-balance" test and on *Murchison*. HELD, even the "appearance" of a bias is disqualifying. *Accord: Mayberry v. PA*, 400 US 455,64-6 (71) (self-representing criminal defendant held in contempt for verbal attacks on judge during trial; vilified

judge disqualified), the controlling authority—*Murchison.*

Clearly the pecuniary interest test of *Tumey,* if it was ever a constitutional limitation upon judicial disqualification, is no longer the law of the land. *Lavoie,* if it intended to so hold, erred.

The Unified Approach of *Liljeberg* Should Be Adopted as the Constitutional Standard:

In 1927, a unanimous Court stated that many matters of judicial disqualification should be left to legislative discretion and that all questions of disqualification do not "involve constitutional validity." *Tumey,* 273 US at 523. Petitioner submits that *Lavoie* neither added to nor subtracted from that holding. The Court further held that questions involving pecuniary interest and the true-balance test *do involve constitutional validity.* Similarly, it has numerously been held that not all judicial errors are of constitutional proportion; only when they seriously impinge upon protected fights do they fulfill this test.

Beyond argument, a fair and impartial tribunal *is* a protected right; the only legitimate debate is the nature of the protection. Our principal theme: The proper constitutional protection would best be afforded by a unified standard. The latest opinion in point is an example of the unified standard. *Liljeberg v. Health Services,* 108 SCT at 2194.

Of course, that case involved a federal statute, 28 USC §455 (74 amdt) but it tracks the constitutional standard. In framing §455, Congress broadly commanded disqualification wherever the judge's "impartiality might reasonably be questioned," *id.* §455(a), and thereafter appended more specific provisions. We submit: The statute

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tracks *Tumey*, which declared a broad constitutional principle and left the legislative bodies free to specifically address the principal evils, as perceived.

What difference between a declaration that a judge is disqualified by "[e]very procedure . . . which might lead him not to hold the balance nice, clear and true," *id.* at 532, and a command that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned?" 28 USC §455(a). *The tests are one and the same.* We cannot envision where the one provision might disqualify and the other *not* do so.

At the same time, neither statement is more than *a broad statement of constitutional principle*, comparable to the Fourteenth Amendment. The term, "Due Process of Law," was coined 100 years ago; its interpretation has only begun. Likewise, interpretation of true-balance and impartiality-subject-to-question will span generations. Today's task is to lay a firm foundation so that decisions under the one standard may be related to the other.

During the two decades before Congress enacted impartiality-subject-to-question, the Supreme Court rendered *not one decision* examining the disqualification of federal judges. During that period, it did render *Murchison* (1955), *Commonwealth* (1968), *Mayberry* (1971), *Ward* (1972), *Gibson* (1973), and *Taylor* (1974), each dealing only with *constitutional disqualification.* Clearly, Congress was concerned with establishing a test consonant with those decisions.

Commonwealth, 393 US at 160, states that a tribunal " . . . not only must be unbiased but must also avoid appearance of bias." As pointed out in *Liljeberg* at n.7, §455(a) was patterned after the ABA Code of Judicial

Conduct. Professor Thode, the reporter for the drafting committee, states that the intent of Canon 3C(1), incorporated into §455(a), was to codify the appearance-of-justice test as described in *Commonwealth*, *supra*. Thode, REPORTER'S NOTES, CODE OF JUDICIAL CONDUCT, 60 (73). We also note a concern with the "appearance of justice" in *Murchison*, 349 US at 135, and again in *Taylor*, 418 US at 500-1; *Lavoie* also indicated a concern with the appearance-of-justice. 108 SCT at 1587 (citing *Murchison)*. It again follows that §455(a) is a statutory restatement of constitutional principle.

We emphasize: §455(a) is *a unified principle of constitutional law. Liljeberg* did not concern itself with abstruse and attenuated tests of direct-pecuniary-interest or his-own-case or bias-for-failure-to-maintain-true-balance. Inasmuch as §455(a) is encumbered with no such baggage, it was possible for this Court and the courts below to go to the heart of the matter, to look at the complete facts, to weigh the relationships and the timing of the incident, and to speak to the matter both directly and in plain English. The Supreme Court needs to go further and hold that the tests labored in *Lavoie* and its predecessors have developed an arcane gloss upon *Tumey's* ultimate test, *i.e.*, the true balance test.

Thusly viewed, *Liljeberg* is direct authority for the reversal of this petitioner's case. Simply stated, neither the Texas Supreme .Court nor its members can satisfy the appearance of justice with respect to petitioner Howell. We grant that the difference in political stripes, standing alone, would hardly constitute a complaint of constitutional proportion. However, you must add the fact that the defendant is an incumbent member of that court, plus the fact that petitioner has engaged in recent election contests with other members of the court, plus the facts concerning the extensive exchange of rivalry and invective. Bear in mind that

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all nine are defendants to federal litigation being prosecuted by this petitioner, plus the facts of other past and present litigation. To this mix, add the fact that four members have seemingly engaged in campaign reporting practices which petitioner, by this case, seeks to condemn.

Did this mix not present a compelling case for disqualification? Has the true balance not become tilted? Is the appearance of justice not absent? Has the impartiality of the honorable members of that court not become subject to question? Petitioner submits the affirmative. As stated in *Liljeberg*, a principal objective of judicial disqualification is "to promote public confidence in the integrity of the judicial process." *Id.* at 2202.[12] Clearly, the balance had fallen askew when petitioner moved for disqualification. The members of the Texas Supreme Court were obligated to withdraw and the United States Supreme Court must now order them to do so.

In the Alternative, Petitioner Has Met the Test Laid Down by *Tumey* and Its Progeny:

To this point, petitioner has urged that the law should be clarified by renouncing tests that create more confusion than enlightenment. However, petitioner does not, by any means, concede that he cannot meet those tests. To the contrary, he has met them all.

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[12]The Court further stated:

> We must continually bear in mid that " 'justice must satisfy the appearance of justice' " [citing Murchison].
>
> . . . .
>
> [P]eople . . . are often all too willing to indulge suspicions and doubts concerning the integrity of judges. . . . [C]onfidence in the judiciary [is to be promoted] by avoiding even the appearance of impropriety whenever possible.

Id. at 2204-5. In this connection, Liljeberg cites Lavoie and states "[T]his concern has constitutional dimensions." Id. at 2205 n.12. In support of the statement, the Court quotes Lavoie's discussion of Tumey, Murchison and Ward, all of which reinforces the proposition stated above, that §455(a) is but a legislative re-statement of constitutional principles.

Direct pecuniary interest: *Lavoie* makes it clear that a collateral, ripple-effect, tangential economic benefit is nonetheless to be classified as direct, so long as it is substantial. *Liljeberg* likewise found a collateral interest to be disqualifying, the challenged judge stating: "Loyola University was not and is not a party to this litigation, nor was any of its real estate the subject matter of this controversy." *Id.* 2206 n.15. Nevertheless, the promised enhancement in value of university land was sufficient to disqualify. *Id.* n.15. *Potential collateral economic rewards to the judge or those identified with him can disqualify.*

The direct (as defined) pecuniary benefit to the Texas justices was the elimination of competition for office and the safeguarding of their employment. Petitioner having been twice a candidate for the court, the prospect of future opposition was substantial.

The four justices whose campaign finance reports were subject to the same evils as alleged against respondent Mauzy (PA 72-86) had a patent economic (pecuniary) interest in the defeat of the instant lawsuit; they are exposed to the prospect of penalties to the State of Texas and statutory treble damages to their former political opponents.

Those four justices are further subject to adverse publicity and public criticism should petitioner maintain this case. This prospect has negative pecuniary implications, perhaps even greater than the penalties and damages. *It places their jobs in jeopardy.* At a minimum, it encourages political opponents to declare against them.

By the same measure, adverse publicity from the loss of the instant lawsuit will cripple petitioner with respect to any future campaign against any one of the Texas justices

thereby insulating them from future competition. They stand to reap a *Lavoie*-type "direct" pecuniary benefit from the ruling in favor of respondent Mauzy, which benefit disqualifies.

His-own-case: Most certainly, the four justices whose campaign finance reports suffered from the same deficiencies as alleged against respondent Mauzy had an axe to grind. By "acquitting" Justice Mauzy of improper reporting practices, they will be insulating themselves from complaint regarding their own reports. By "acquitting" respondent, they are acquitting themselves—the precise situation precipitating his-own-case rulings in *Lavoie* and *Murchison.*

For an office holder, and particularly for a judge, to be held to have filed a meritless lawsuit against a political opponent has implications far beyond the economic loss incurred. Postulating that petitioner will suffer adverse publicity from defeat in this lawsuit and that petitioner is a potential political opponent for all seven participating justices, it follows that all seven have an his-own-case interest in the defeat of petitioner's lawsuit; they are disqualified.

What a great campaign issue, not only for 1990, but for several elections beyond. "He files groundless lawsuits against his opponents." Again, take note that petitioner has an ingrained habit of running for judicial office every two years. He gained elected to a trial court and has risen to an intermediate court, only the Supreme Court remains. Every justice interested in retaining his seat and in being free from burdensome re-election campaigns has reason to desire that petitioner be "convicted" of filing a groundless lawsuit. Even those of his own political party are subject to primary election challenges (PA 16,27-33). They are in the same position as the vilified judge in *Taylor.* Similar to *Lavoie,* each justice has a

reason to desire that the negative precedent be upheld. It follows that each justice was presiding in "his own case."

Appearance of Bias: *Gibson* held that a disqualifying bias exists wherever there is an apparent temptation to try the case with bias for or against any issue. *Id.* 571. A similar holding is to be found in *Commonwealth.* The Supreme Court declined to expressly approve *Gibson* on this ground, but it spoke favorably. *Commonwealth* and the three judge district court in *Gibson*, 331 FS at 125-6, support application of the appearance of bias test to petitioner's case.

The political differences, the rivalries, the repeated campaigns for election to the court, the lawsuits, both past and pending—when added together, they produce a substantial, even an extreme showing of appearance-of-bias, the converse of appearance-of-justice. We emphasize that *appearance* is the deciding factor. The record clearly reflects the temptation not to hold the balance straight and true; disqualification for appearance-of-bias has been shown.

The Same Argument Supports the Companion Tests: A principal theme is that the various tests for disqualification have been expanded to the point of overlap; their separate identity has been lost. We argue the tests separately, in case the Court does not agree. However, our arguments under the three tests necessarily overlap. To avoid repetition, we invoke all arguments under this topic in support of each test urged herein.

In Further Alternative, Reversal Is Necessary Because at Least One Member of the Court Was Disqualified:

In *Lavoie,* Mr. Justice Brennan wrote a concurrence stating that the participation of the sole

disqualified justice "was sufficient in itself to impugn the decision." *Lavoie*, 106 SCT at 1590 (conc. op.). Mr. Justice Blackmun, joined by Mr. Justice Marshall, also concurred that the "mere participation" by the disqualified justice "posed an unacceptable danger of subtly distorting the decision making process." *Lavoie*, 106 SCT at 1591 (conc. op.). The majority declined to reach the question whether the disqualification would require reversal where the challenged vote is "mere surplusage." Mr. Justice Stevens did not participate.

Justice Gonzalez Was Clearly Disqualified—Less than twelve months before he sat in judgment favoring his colleague and fellow political party member, Justice Gonzalez was locked in raucous combat with petitioner over Justice Gonzalez's judicial position. He was marching all over the state denouncing petitioner as a "kook." Petitioner's response, in part, was a complaint to the Judicial Conduct Commission accusing Justice Gonzalez of unlawful campaign practices. When he learned that he was winning, Justice Gonzalez proclaimed, "Given the opposition, I would've expected to have done better" (PA 61). When the Commission ruled in his favor, Justice Gonzalez caustically declared, "It's unfortunate that we have people like Charles Ben Howell who don't know when to quit" (PA 58-9). Additionally, Justice Gonzalez is one of the four justices whose campaign disclosures suffer from the same insufficiencies that are under attack in this very case. (PA 72-5,7-8,81-3,4-5).

Economic disqualification has been thoroughly discussed, along with other tests. Justice Gonzalez was disqualified under any test, even the display-of-animus test first enunciated in *Berger*, 255 US at 22, and the "extreme circumstances" test surmised about in *Lavoie*.

Chief Justice Phillips Was Clearly Disqualified —Petitioner was a rival candidate, although briefly, for the Chief Justice's seat in the 1988 Republican primary. In 1986, the petitioner defeated, in the Republican primary, Chief Justice Phillips' friend and confidant Justice Hecht, for whom the Chief Justice had supported, worked and contributed. During the 1988 campaign, the Chief Justice went out of his way to dis-associate himself from petitioner finally declaring that he was no part of petitioner's campaign, "This is a good example of why I'm pleased that I'm just running my own race" (PA 16, 7, 22, 7-33, 7-8; also R/TXSCT, Ver. Exhs. 77, Political Contribution, $100.00, Hon. Thomas R. Phillips to "Judge Hecht for Supreme Court").

The Chief Justice lost his investment in his friend's campaign. His job was jeopardized in 1988. By any test enunciated herein, he was precluded from sitting in judgment upon petitioner's case in 1989.

Petitioner urges that participation of a single disqualified judge infects the entire judgment. The offended party cannot hear or respond to argument made by the disqualified judge to his colleagues. The only means to rectify the situation is to reverse.

There is a paucity of authority concerning appellate courts, but the better view is that if a single disqualified justice participates in the deliberations, the entire decision is fatally infected. *Case v. Hoffman*, 74 NW 220 (1898); *Oakley v. Aspinwall*, 3 NY 547 (1850). Most of the cases indicating a contrary view are distinguishable.

Most of the disqualifications in authorities not following *Case-Oakley* would classify according to *Tumey*, as being within "legislative discretion." *Id.* 523. Insofar as the

states are free to create legislative disqualification, they are free to decide the consequences of that disqualification. Here, we urge constitutional disqualification, a more serious matter than legislative disqualification. Witness that the *Lavoie* disqualification was first raised in a tardy motion for rehearing. Witness that the *Liljeberg* disqualification was not raised until after an appeal was complete. The Supreme Court's willingness to consider late-blooming claims constitutes a profound judgment on the seriousness of constitutional disqualification.

Comparative Rectitude Demands Reversal:

If the Court is not prepared to accept the *Lavoie* concurrence in full, it should weigh the totality of the circumstances. The *Lavoie* majority intimates a willingness to adopt such an approach. *Id.* 1588 n.4. The overriding reason to grant relief, even if only one, two, or three members of the appellate court be held disqualified, is the Caesar's wife test. In petitioner Howell's case, no member of the Texas Supreme Court can be held completely above reproach. The marginal qualifications of certain justices, taken in combination with one or more clear disqualifications, creates a tribunal from which petitioner should have relief.

Petitioner does not retreat from his basic proposition. All members of the Texas Supreme Court were disqualified. At a minimum, a quorum was disqualified. As a further alternative, *comparative rectitude demands reversal.*

An appellate court is but a single unit. No member has the power to decide any case except by participation in a majority vote. Another alternative is to test the court as a unit, an entity. In the case *sub judice,* it is plain that the rectitude of those members, against whom the Supreme Court may fail to

sustain a challenge, was insufficient to cure the unconstitutional act of the court, in allowing those who were clearly disqualified, to sit. Any lesser ruling will insulate the Texas Supreme Court, and every other multi-member court, from constitutional challenge, for the most egregious reasons, against anything less than a majority of the court's members.

Recap—First Question: Disqualification Was Required.

Beginning with *Tumey*, the United States Supreme Court has, from time to time, recognized multiple tests for the constitutional disqualification of judges: (1) the true-balance test; (2) the pecuniary interest test; (3) the his-own-case test; (4) the appearance-of-bias test (some may consider the absence of an appearance-of-justice as a separate test, petitioner views it as merely the converse of appearance-of-bias); and (5) possibly, actual bias (display of judicial animus, *Lavoie* hazards its possible application in "most extreme" cases; *id.* 1585). The separate tests have been extended by construction to the point where they hopelessly overlap. The true-balance test should be recognized as the only test. The remaining "tests" should be recognized as special circumstances weighing upon the primary test.

If petitioner be mistaken in his proposition that the true-balance test governs his case, as an overriding test, he presents, in the alternative that at least a majority of the Texas Supreme Court was disqualified under one or more of the above tests.

As a further alternative, petitioner presents that he has presented a clear case for the disqualification of one or more members of that court. Inasmuch as the disqualified justice or justices participated in the deliberations, the decision of the court is infected and must be reversed.

If the *Lavoie* concurrences are not fully accepted on this point, petitioner still presents that he should have reversal based upon the totality of the circumstances.

SECOND QUESTION—The Distinction Is Unreasoned:

The Texas Supreme Court, like most, if not all upper tier courts exercises its jurisdiction in two stages. Litigants must first apply for a writ of error. The court studies the application in conference, selects a limited number of cases (9-14% annually) for argument and plenary consideration; the writ of error is summarily denied with respect to the remainder (86-91%). Inasmuch as proceedings at the writ stage are summary, and five out of six cases are disposed at that stage, it is obviously of great importance that the court adopt fair and uniform procedures for the consideration of writ applications.

For many years, the Texas Supreme Court applied the Rule of Three to writ applications. That is, the court granted the application and docketed the case for plenary consideration if as many as three justices, in conference voted to do so.[13]

By order effective January 15, 1988 (PA 87), the

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[13] Calvert [Ch. J., ret'd, TXSM CT], Application for Writ of Error, APP.PROC.TX, 603,13 (79): "If as many as three judges . . . vote [to do so], the application [for writ of error] is granted."

Greenhill [then Ch. J., TXSM CT], Advocacy in the Supreme Court, 44 TXBJ 624,6 (81): "All of us sit on every application. If three of us are of the tentative view that the judgment . . . [below] is wrong, the writ will be granted."

Boyd, Overview of Writ of Error Jurisdiction, 46 TXBJ 892,4 (83): "[I]f as many as three justices are tentatively of the opinion that the court of appeals erred . . . , the application will be granted."

Robertson [then J., TXSM CT] &P., Meaning of NRE, 48 TXBJ 1306,8 (85): "By court policy of long standing, three votes are sufficient to grant an application for writ of error."

Texas court converted its Rule of Three into a Rule of Four.[14]

The Rule of Four placed petitioner in a quandary. The court is composed of nine justices. If four were present and voting upon his writ application, he only needed to persuade four of nine (44% of the panel) to vote in his favor in order to obtain the writ. However, if he successfully moved the disqualification of one justice,he was burdened to persuade four of eight (50% of the reduced panel) to vote in his favor. If he successfully challenged two justices, he was burdened to obtain four of seven (57%). As the panel might be reduced, his burden increased to four of six (67%) and four of five (80%). Beyond that point, there would be no quorum and the case would need to be certified to the governor for the appointment of special justices. TXCONST art. V §11.

In short, the Texas Rule of Four places this petitioner, or any other litigant similarly situated at a disadvantage. For every justice that might be disqualified, the litigant is burdened to persuade a greater proportion of those remaining to vote in his favor. The Rule of Four necessarily makes a motion to disqualify, addressed to the Texas Supreme Court, of dubious value to an applicant, no matter how egregious the disqualification. In fact, it is penal in its application, theoretically rising to the point where a litigant

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[14]Carlson & G., Discretionary Review, 50 TXBJ 1201,2n.21 (87), states: "By vote of the members of the Supreme Court, effective in July 1987, four votes are now required to grant an application for writ of error" (emphasis added). The principal author is identified as a member of the Supreme Court Advisory Committee and the co-author is identified as a former briefing attorney with the Court. 50 TXBJ at 1207.

The discrepancy between Professor Carlson's article and the effective date as finally stated in the court's order was explained by an article in Texas Lawyer. "Court Imposes 4-Vote Rule," 3 TX LWYR no 45, p.1 (05FE88). The court delayed implementation of the change because of the imminence of the filing with it of the Texaco-Pennzoil litigation and the public furor surrounding that case (See PA 24-6).

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must convince four out of five participating justices even to allow full consideration of the case.[15]

Following petitioner's challenge, Justices Mauzy and Hecht stepped down (PA 6-7). This availed petitioner nothing. He was still burdened to secure four votes from the seven surviving members of the court. In fact, petitioner's burdens were increased. He was then obligated to secure the affirmative votes of four of the seven (57%) surviving justices—all colleagues, daily working associates, and social acquaintances of respondent Mauzy—to even gain a hearing.

In an effort to obtain relief from his quandary, petitioner filed his "Motions Precedent" (PA 62-72) to his disqualification motion asking that the Rule of Four be reduced by one for each justice who failed to participate. Thus, the Rule of Four would have been reduced to a Rule of Two after the departure of Justices Mauzy and Hecht. Had four justices removed themselves, petitioner's motion would have required that a writ of error be granted forthwith. The court refused to grant relief from its Rule of Four (PA 6-7).

The procedure *effectively penalized petitioner for the fact that two admittedly disqualified justices were present on the court.* For each disqualified justice on the court, petitioner was deprived of the one-ninth of the tribunal provided for by the Texas Constitution as the state's court of last resort. Whether petitioner sought the exclusion of the tainted justices or not mattered little. The state constitutional provision for a

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[15]The only gain that the aggrieved litigant might secure from a motion to disqualify, short of disqualifying the entire court, is that the challenged justice will be excluded from deliberations. The countervailing consideration is that the litigant successfully moving the disqualification of a justice irrevocably precludes the possibility of persuading the disqualified justice to accept his views. The Texas Rule of Four (unnecessarily, petitioner submits) places the aggrieved party on the horns of a dilemma.

tribunal of nine, interpreted in the light of the Fourteenth Amendment, meant that petitioner was entitled to address a tribunal of nine justices, *not disqualified.*

Had the Rule of Four been adjusted in response to petitioner's motion, the absence of two justices would have been a matter of minimal concern. However, inasmuch as the court refused to adjust the Rule of Four, petitioner's burdens were real. *He was forced to secure the votes of more than a majority of the reduced tribunal of seven,* even to gain a plenary hearing. Such burden, and its obvious penal effect was a discriminatory burden upon the right of appeal offending the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Although the federal constitution does not guarantee the right of appellate recourse in state court, it does guarantee that those avenues of recourse must be free and open. Unreasoned distinctions upon the right of recourse to the courts offend the Constitution. *Lindsey v. Normet,* 405 US 56 (72); *NC v. Pearce,* 395 US 711 (69); *Rinaldi v. Yeager,* 384 US 305 (66).

The penal effect of the Rule of Four was real: the discriminatory effect, insofar as petitioner was concerned was substantial. The alternative—reduction of the number of votes required in order to obtain the writ—posed no significant burden upon the court or upon respondent. Motions for the disqualification of appellate justices are rare. *Petitioner had to make a significant showing of merit in order to obtain any votes at all* in the writ conference. Respondent was fully protected because the case must eventually be disposed by majority vote following plenary consideration on the merits.

The Constitution has been offended by a

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requirement of Texas law that required this petitioner to obtain *more than a majority vote* (57%) to even obtain a plenary hearing. For the correction thereof, the writ should issue.

CONCLUSION

For each reason given in support of the questions presented, a writ of certiorari should issue.

Respectfully submitted,

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Appendix

No. ____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL, *Petitioner*

V.

OSCAR MAUZY, ET AL., *Respondents.*

PETITIONER'S APPENDIX

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 18, 1989.

[Notation re: Opinion of the
Texas Supreme Court]

[Note: By this petition for certiorari, petitioner complains of the refusal of the Texas Supreme Court to require any of its justices to disqualify in response to petitioner's motions challenging their impartiality. The Court delivered no opinion or other explanation, written or oral, concerning its refusal to do so. The relevant orders of the Texas Supreme Court are reproduced in this appendix, *infra.]*

COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 3-88-181-CV; May 31, 1989.

[OPINION, 774 S.W.2d 274]

[Note: In compliance with the rules of the US Supreme Court, the opinion of the Texas Court of Appeals is reproduced at this point. However, petitioner does not consider it relevant to any question raised by this petition.]

Before POWERS, GAMMAGE and ABOUSSIE, JJ. POWERS:

Charles Ben Howell, plaintiff below, appeals from a summary judgment rendered by the trial court on the motion of Oscar Mauzy, defendant. We will dismiss the appeal for want of jurisdiction.

THE CONTROVERSY

After contested primary elections, Howell and Mauzy became the Republican and Democratic party nominees, respectively, for a term of office as justice of the Supreme Court of Texas, to begin January 1, 1987. Shortly before the general election was held in November 1986, Howell filed the present lawsuit to recover money damages, and injunctive relief, based upon Mauzy's alleged violation of several campaign-financing limitations and requirements imposed upon candidates for public office by the Texas Election Code Ann. (1986 & Supp. 1989). Sections 251.008 and 521.011(k) of the Code create, in favor of an "opposing candidate," a civil liability on the part of a candidate who violates the limitations and requirements in question.

Mauzy answered in the suit by a general denial,

accompanied by his plea that Howell's causes of actions should be dismissed because Howell lacked the "standing" necessary to recover thereon. Mauzy alleged as well a counterclaim for a declaratory judgment, to the effect that Mauzy had in fact complied with the campaign-financing provisions of the Election Code. Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§37.001-37.011 (1986 & Supp. 1989). In his counterclaim, Mauzy prayed for the attorney's fees authorized by §37.009 of the Uniform Declaratory Judgments Act: "the court may award [such] costs and reasonable and necessary attorney's fees as are equitable and just."

Howell and Mauzy moved for summary judgment on their respective causes of action. After making interlocutory rulings on each of Mauzy's two motions for summary judgment, the trial court signed on April 18, 1988 the judgment we are asked now to review. The instrument provides:

* * * * * *

The Court having entered two separate summary judgments in this matter on March 24, 1988, which summary judgments disposed of the issues before the Court;

It is accordingly ORDERED and ADJUDGED that Howell take nothing by his action and that Howell's action is hereby dismissed;

It is further ORDERED that Mauzy have and recover judgment on his counter-claim for declaratory relief as set forth in the summary judgments previously entered and that Mauzy have and recover as a reasonable attorneys' fee the sum of $10,000.00, for obtaining the declarations of law as set out on March 24, 1988, and his costs.

In the event an appeal is taken in this matter, Mauzy is granted leave to apply to this Court for additional attorney fees, if appropriate, following remand.

Howell in open court took exception to these actions and gave notice of appeal. . . .

* * * * * *

We have supplied the emphasis in the foregoing quotation, and substituted the parties' surnames for clarity.

DISCUSSION AND HOLDINGS

Apart from exceptions not applicable here, we have jurisdiction to review only the final judgments of lower courts. Tex. Civ. Prac. & Rem. Code Ann. §51.012 (1986); *North East Independent School District v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). Both parties have assumed, in this appeal, that the instrument signed by the trial court on April 18, 1988 *is* a final judgment within our power to review on assignments of error. We should nevertheless inquire in that regard because a final judgment is essential to our power to give a decision in the appeal. *See Wagner v. Warnasch*, 295 S.W.2d 890, 893 (Tex. 1956). We conclude the instrument lacks on its face the essential attributes of a final judgment.

We hold the purported final judgment is interlocutory because it explicitly provides the trial court might, "if appropriate," take further action in its adjudication of Mauzy's claim for attorney's fees under §37.009 of the Uniform Declaratory Judgments act; so much is indicated by the statement granting Mauzy leave to apply to the trial court for additional attorney's fees, after remand, in the event an appeal is taken. This amounts to a reservation of power in the trial court to enlarge the sum awarded Mauzy as attorney's fees, in an additional amount over $10,000.00 (the sum

stipulated by the parties to be reasonable in amount), as determined by the trial court after this appeal. Consequently, the instrument does not finally dispose of Mauzy's claim for attorney's fees under §37.009, and the instrument cannot serve as a basis for appeal. *Baker v. Hansen*, 679 S.W.2d 480, 481 (Tex. 1984).

The recovery of statutory attorney's fees, in a sum enlarged or reduced according to the course of events occurring in an appeal taken by a party liable for such fees, is permissible and almost routine. To make the attendant judgment certain, definite, final, and unconditional, however, the award of attorney's fees must be in terms that permit the clerk of the court to calculate the sum dictated by post-trial events, and place that sum in the writ of execution, as a *ministerial* act merely. *International Security Life Insurance Company v. Spray*, 468 S.W.2d 347, 350 (Tex. 1971); *see also Steed v. State*, 183 S.W.2d 458, 460 (Tex. 1944). That cannot be done ministerially under the terms of the instrument in question, which calls explicitly for the performance of a *judicial* function, after remand, in determining whether additional attorney's fees are "appropriate" and, if so, what sum should be awarded under the statutory authorization for attorney's fees that are "reasonable and necessary" and "equitable and just." These unquestionably imply a determination of issues of fact and law, as opposed to a ministerial function. We hold accordingly.

We should include these additional observations owing to the likelihood of a subsequent appeal. The meaning of the statement in the purported final judgment, relative to post-trial attorney's fees, is quite unclear because it makes Mauzy's possible entitlement to additional attorney's fees depend upon a *remand*, which implies in turn a *successful* appeal by Howell—the party against whom the additional

sums would be adjudged. We doubt this literal meaning was intended, but no other meaning appears reasonable in view of the language employed. The uncertainty of the purported final order is augmented further by the statement therein directing that Howell *take nothing* by his action against Mauzy, while ordering simultaneously that Howell's action is *dismissed.* These orders are inherently inconsistent.

Howell has filed in his appeal several motions that we have no power to determine for the reason given above. We therefore order that they be dismissed.

We order the appeal dismissed for want of jurisdiction.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 18, 1989.

[ORDER]

Application of petitioner, Charles Ben Howell, together with application of petitioners, Oscar Mauzy et al., for writs of error to the Court of Appeals for the Third District, together with motion for disqualification or recusal of certain justices filed herein on behalf of petitioner, Charles Ben Howell, having been duly considered, it is ordered that the motion for disqualification or recusal be overruled, and the Court having determined that the applications present no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said applications be, and hereby are, denied (Justices Mauzy and Hecht not sitting).

It is further ordered that applicant, Charles Ben Howell, and sureties, Robert S. Bean and J. H. Bean, and applicants, Oscar Mauzy et al., pay all costs incurred on each respective application.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; February 26, 1990.

[CLERK'S LETTER TO PETITIONER]

In response to your faxed request of February 26,* the judgment of the Supreme Court which was delivered on October 18, 1989 disposed of all matters before our Court in the above styled and numbered cause.

[*stating that according to petitioner's understanding, his pleading entitled "Motions Precedent," etc. was overruled on October 18, 1989 and requesting that the clerk provide to him "the order or revised order that disposed of" the said motion.]

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; November 8, 1989.

[ORDER]

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Mauzy and Justice Hecht not sitting.)

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; November 15, 1989.

[CLERK'S LETTER TO PETITIONER]

The "Supplement to Motion for Disqualification or Recusal of certain Justices" has been submitted to the Court.

We have been instructed to return the above mentioned document to you without action as the judgment in this case was final November 8, 1989.

COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 3-88-181-CV; May 31, 1989.

[JUDGMENT]

THIS CAUSE came on to be considered on the transcript of the record and same being inspected, because it is the opinion of this Court it is without jurisdiction of the appeal: IT IS THEREFORE considered, adjudged and ordered that the appeal herein be and is hereby dismissed for want of jurisdiction. It is FURTHER ordered that appellant, Charles Ben Howell, as principal, and Robert S. Bean and J. H. Bean, as sureties on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. 3-88-181-CV; August 2, 1989.

[ORDER]

Appellant's Motion for Rehearing
Motion is Submitted and Overruled

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM CHIEF JUSTICE]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM JUSTICE SPEARS]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM JUSTICE RAY]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM JUSTICE GONZALEZ]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

MEMORANDUM FROM JUSTICE COOK]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM JUSTICE HIGHTOWER]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 16, 1989.

[MEMORANDUM FROM JUSTICE DOGGETT]

A motion for disqualification or recusal has been filed in this cause. The motion is directed in part toward me.

Pursuant to Rule 15, Tex. R. App. P., I "certify the matter to the entire court" for determination.

EXTRACT FROM PLEADINGS OF PETITIONER

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 5, 1989.

[PETITIONER'S] MOTION FOR DISQUALIFICATION OR RECUSAL OF CERTAIN JUSTICES

This motion is based upon the affidavit of Charles

Ben Howell, annexed hereto and incorporated herein by reference. Such affidavit states with particularity the grounds why each of the aforesaid justices of this court should not sit in this case. Specifically, with respect to each and every one of the aforenamed individual justices of the Supreme Court, the affidavit states facts from which it may fairly and reasonably be inferred that each of the aforenamed justices harbors a personal bias or prejudice toward this petitioner. Alternatively, the facts set forth in the annexed affidavit present the fair and reasonable inference that the impartiality of each of the above-named justices might reasonably be subject to question. Based thereon, petitioner alleges that each of the aforenamed justices is disqualified to preside herein or, alternatively, each of the aforenamed justices is subject to recusal herein.

This motion is grounded upon and is made pursuant to the provisions of Rule 15a(2) of the Texas Rules of Appellate Procedure providing:

> Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or a personal knowledge of disputed evidentiary facts concerning the proceeding.

This motion is alternatively made pursuant to and is grounded upon the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and upon the provisions of the Constitution of the State of Texas guaranteeing Due Process of Law and Due Course of Law. In particular, petitioner relies upon those constitutional principles declaring that a trial before a fair and impartial tribunal, a tribunal

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whose members are not only fair and impartial in fact, but fair and impartial in appearance, is a cornerstone of Due Process.

Petitioner further moves that the court apply to this case the mandatory disqualification standards enunciated in connection with R.15a(1) of the Texas Rules of Appellate Procedure. That is to say, petitioner moves that this court hold it to be mandatory that a judge or justice withdraw from the case wherever it may fairly and reasonably be inferred that such judge or justice harbors a personal bias or prejudice toward a party or wherever the fair and reasonable inference is presented that the impartiality of such judge or justice might reasonably be subject to question.

In this connection, petitioner would show that R.15a(1) sets forth the standards for the withdrawal from a case of a judge or justice pursuant to the disqualifications or recusal provisions of the Texas Constitution, Art. V, sec. 11, whereas R.15a(2) undertakes to set forth the standards for recusal or disqualification of judges pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Insofar as the said rule purports to establish less onerous requirements for an offended party to secure recusal or disqualification grounded upon the State Constitution than the requirements imposed in order to secure recusal or disqualification grounded upon the Constitution of the United States, said Rule 15a is unconstitutional as repugnant to the Due Process and Equal Protection Clauses of the United States Constitution. If such be necessary, petitioner challenges the said R.15a on the grounds of invidious discrimination.

Petitioner moves and directs the Clerk of the Supreme Court to present this motion to each of the above named justices ten days after the filing hereof so that each

such justice may decide either to voluntary disqualify or recuse or to certify the matter to the entire court.

Should any of the justices named herein decline to withdraw from the case, petitioner moves and requests that each said Honorable Justice so declining prepare and file with the court, prior to en banc hearing hereon, a statement in writing responding to and answering the fact allegations contained in this motion and in petitioner's affidavit. This request may be satisfied through a short statement to the effect that the facts stated by petitioner with respect to the statement-maker is substantially correct. Any error or omission by petitioner should, of course, be pointed out.

Petitioner waives any requirement that statements by the individual justices be verified. If the said Honorable Justices or any of them should either decline to prepare a statement or if the statement should be manifestly insufficient, then the court when it convenes itself en banc should consider the allegations and conclusions of this petitioner herein contained to be fully established and petitioner so moves.

Copies of this motion are being served on all other parties or their counsel of record as shown by the certificate hereto and said parties and their counsel are hereby provided with notice that movant expects this motion to be presented to each of the justices mentioned herein ten days after the filing of this motion unless otherwise ordered by any justice aforenamed or by the court. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

Wherefore, PREMISES CONSIDERED, petitioner asks relief as follows:

(1) That the above-named Chief Justice and Justices Spears, Ray, Gonzalez, Mauzy, Cook, Hightower, Hecht and Doggett and each of them proceed to voluntarily disqualify, recuse or withdraw herefrom or that they respectively certify their individual unwillingness to do so to the court en banc;

(2) That should they or any of them decline to disqualify (recuse), then that each said justice so declining proceed to file with the court a written statement responding to the factual allegations of this verified motion;

(3) That this motion be heard en banc deciding the recusal of each justice, one at a time, so that the particular justice being considered each time shall not sit en banc to consider the motion as it directly affects him;

(4) That each of the aforesaid Honorable Justices be recused or disqualified from further service herein;

(5) That the fact of disqualification or recusal be certified to the Governor of the State together with a request that he immediately commission the requisite number of persons, learned in the law and not possessed of the impediments or disqualifications outlined herein, for the trial and determination of this cause.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 5, 1989.

[PETITIONER'S] AFFIDAVIT IN SUPPORT OF MOTION FOR DISQUALIFICATION OR RECUSAL

I am 64 years of age. I have been for the major part of my adult life involved in Republican politics. I have continuously been involved in Republican party affairs and have worked for, contributed to and publicly supported the candidates of the Republican party. Including the 1988 election campaign, I have been a candidate for office for the last eleven successive elections. Every two years commencing in 1968, I have filed in the Republican primary as a candidate for judicial office. My campaigns were always contested and in most instances, I ran against a Democratic incumbent. My first six campaigns were unsuccessful. In 1980, I was first elected as a district judge in Dallas County, ousting a Democratic incumbent. In 1982, I was re-elected, defeating a Democratic challenger. In 1984, I was elected as Justice of the Court of Appeals for the 5th District defeating a well-entrenched Democratic incumbent. I am presently serving on that court.

In my campaign, I have avoided all types of false charges. I have never-the-less been a hard hitter and have leveled numerous charges against my Democratic opponents. I have come to be known as a controversial candidate; some have called me a maverick. My campaigns, particularly in recent years have become lightning rod campaigns where the entire Democratic slate and the Democratic party organization in general have targeted me as the judicial candidate that they were most anxious to beat. Regardless of such facts, I have been elected and re-elected. Because of the foregoing, I

have accumulated a large number of critics and detractors, within the Democratic party and within the liberal press.

On January 23, 1986, I formally announced, filed the official application for place on ballot and paid the filing fee as a candidate in the Republican Primary for the office of Justice of the Supreme Court, Place 1. My probable Democratic opponent at that time was the Honorable Oscar Mauzy. Prior to the filing deadline of February 3, 1986, Judge Nathan Hecht filed for the same office in the Republican Primary and I thereby became involved in a contested primary. Primarily because of a shortage of funds and resources, I desired to avoid the necessity of a primary election contest. I consulted with the State Republican Chairman, the Honorable George W. Strake, Jr. about the problem on February 3, 1986, immediately prior to the deadline to file for office. With his consent, I withdrew as a candidate for Justice of the Supreme Court, Place 1 and filed for office as Justice of the Supreme Court, Place 3. In such position, my probable Democratic opponent was the Honorable James P. Wallace, a respondent to my motion for recusal. He had no other opponent, Republican or Democrat.

On February 20, 1986, Judge Wallace filed a suit against me as an original Mandamus action in the Supreme Court of Texas, No. C-5034. I counter-claimed filing a suit to remove Judge Wallace from the ballot, No. C-5057, filed on February 27, 1986.

Believing then as I now believe, that I would be unable to obtain a fair and impartial hearing before the Texas Supreme Court, I filed on February 27, 1986 a motion for recusal in both of the aforesaid pending causes Nos. C-5034 and C-5057 challenging the Chief Justice and each other justice on the Court. The said motion was overruled by the

court on March 3, 1986. The court failed to hold a hearing of any kind and failed to render an opinion of any kind. Even though requested to do so, none of the challenged judges issued any kind of statement responding to plaintiff's specific reasons, given under oath, for the recusal or disqualification of each said justice.

The combined causes, Nos. C-5034 and C-5057 were argued before the court on two days' notice, said hearing occurring on March 5, 1986. My counsel, Mr. Howard D. Pattison, commenced his argument by discussing plaintiff's motion for recusal and disqualification. Members of the court, particularly Justice Kilgarlin and Justice Spears began lecturing my attorney to the effect that such motion had already been overruled and that counsel should proceed to the merits. My counsel argued that the matter was of importance, not only to the case in hand but to the law in general, there being no Texas case and few cases nationally ruling upon the grounds for disqualification or recusal of an appellate court or its members on grounds of bias and prejudice or the appearance thereof. My counsel insisted that such aspect of the case should be fully heard and that the court should deliver an opinion thereon. Within the first five minutes of the allotted forty-minute argument time (20 minutes for each case), my attorney was ordered from the bench to discontinue his presentation upon the motion for recusal or disqualification or he would be required to discontinue his argument altogether and take his seat.

I was present and heard everything that transpired. Several representatives of the news media were present. Afterwards, a news dispatch from UPI stated that the Honorable Chief Justice Hill "bristled Wednesday when an attorney requested that the entire court recuse itself" on the proposition that "said Democrat-dominated court would give

the appearance of bias if it heard the case involving Howell, a Republican." The Honorable Chief Justice was further quoted as declaring:

> We are a legal court, a law court. We do not make our decisions based on politics, . . . we make rulings based on the law. Politics plays no part in our decision making.

On March 12, 1986, the court issued an opinion removing me from the Place 3 ballot and refusing to remove my Democratic opponent, Justice Wallace from the ballot. See *Wallace v. Howell*, 707 S.W.2d 876 (Tex.1986). The opinion omitted all discussion of the fact that I had sought the removal of all incumbent justices from the case. It was released at 9:00 a.m. Anticipating the court's ruling, I had previously notified the capital press corps that I would hold a press conference on the front steps of the Supreme Court Building at 9:00 a.m. on that date. The news conference was attended by reporters from newspapers, radio and television. In good faith, I criticized the Supreme Court and its justices for the issuance of a blatantly political decision. In my remarks and in my prepared news releases, I criticized the court and each of its members for refusing to hear argument upon the recusal motion and refusing to address the disqualification issue in its opinion. I stated that the issue would not go away simply because the court chose to pretend that the issue was not there.

At the same time, a committee of the state legislature, known as the Tejeda Committee was conducting investigations into allegations of possible misconduct on the part of members of the Supreme Court and its proceedings were widely reported by the news media. Shortly after March 12, the Honorable Chief Justice testified before the committee.

According to published reports, he accused me or inferred that I had infiltrated the court through unnamed members of its staff and that I had thereby obtained a leak or advance information regarding the court's decision in the Judge Wallace litigation. Apparently, he based his charges upon the fact that I had scheduled a news conference in advance before knowing of the court's decision and that I had distributed at that conference and immediately thereafter, about 30 copies of a previously-prepared news release criticizing the court's decision. On information and belief, a copy of that news release was exhibited to the Chief Justice by some recipient thereof, probably for the purpose of obtaining his comments. In all likelihood, copies of the news release were circulated to all members of the court and discussions were had among the justices concerning my news release and my news conference, which discussions included comment on the fact that my news conference was obviously pre-arranged, and prepared in advance and purposely scheduled to occur simultaneously with the issuance of the court's decision.

Upon being advised of the Chief Justice's testimony before the Tejeda Committee, I immediately contacted the news media and denied the charges. I stated that it was ridiculous to assume that this Republican judge residing in a city 200 miles distant from the court had any secret means to invade the deliberations of an all Democrat court. I stated that my news conference and news release were pre-arranged because the political bias and the arrogant attitude of these justices was completely transparent, the result of the case being obvious from the outset to any intelligent observer of the law and the political scene.

On March 25, 1986, I brought suit seeking relief from the action of the Texas Supreme Court in the United States District Court for the Southern District of Texas at

Houston, *Howell v. The Supreme Court of Texas, et al,* Cause No. H-86-1230. All nine members of the Supreme Court were named as parties to the action and were served with summons, my complaint alleging:

> Inasmuch as plaintiff attacks the interpretation [of the Texas Election Code] promulgated by the Supreme Court of Texas, the Supreme Court and its justices are made parties hereto . . . in accordance with the *Heffner v. Alexander,* 779 F.2d 277 (Fifth Circuit 1985).

Copies of my complaint were officially served upon each member of the Supreme Court and were read by each of them. In the complaint, I made several allegations that the defendant members of the court would in all likelihood consider as derogatory and disparaging. The case was actively followed by the news media and I was interviewed regarding the case on several occasions. I was quoted as continuing to criticize the Supreme Court for entering a decision which I considered to be politically motivated. A temporary injunction hearing was held in the federal court during April, 1986. All nine justices of the Supreme Court appeared by counsel. The Honorable James P. Wallace was placed under subpoena by my attorney and he was forced to appear and testify through adversary examination. Through such examination, my attorney established that Justice Wallace had elected to file a case before a Supreme Court composed of his political allies, his friends and his colleagues, with whom he had a continuous daily working relationship, instead of filing the case with a lower court which had ample jurisdiction to consider his claims.

The federal district court denied relief on jurisdictional grounds unrelated to the merits and my attorneys

took an appeal to the United States Court of Appeals for the 5th Circuit. Through my attorneys, I moved for immediate hearing in that court and the court, finding my case to be meritorious in nature, ordered the same to be heard about six weeks hence. In the meantime, I won the primary election contest for Place 1 against Judge Nathan Hecht, an election contest that I had sought to avoid and which I could not afford to run. I then concluded that it was my best recourse not to further deplete my resources with litigation and to campaign for election to Place 1 on the Supreme Court as ordered by the decision of March 12. I therefore withdrew my federal appeal and it was dismissed.

Because of the action of the Supreme Court, I was forced to deplete my resources in litigation and in conducting an unwanted Republican primary election contest with Judge Nathan Hecht. I was also forced to run against then State Senator Oscar Mauzy, the Democratic nominee for Place 1 rather than against Justice Wallace. Senator Mauzy, through long service in the legislature, was far better known to the voting public than Justice Wallace and had considerably more political campaign experience. He had far more funds to spend than Justice Wallace. Even so, I managed to obtain almost 45% of the vote against Senator Mauzy. If the money and resources that I had been forced to squander in the Republican primary and in the Judge Wallace litigation been available to me during the general election and had I been able to campaign against the lesser known Democratic candidate with less funding and less campaign experience, I believe that I could have won election to the Texas Supreme Court in 1986. By and through their rulings in Justice Wallace's case, the respondent Democratic members of the Texas Supreme Court managed to maintain 100% Democratic control over that court until January 1988.

The election campaign lasted until November, 1986. I traveled throughout the state. I talked to many groups and organizations. I was interviewed by numerous reporters for newspapers, radio and television broadcasters. I continually criticized the fact that Texas had an all-Democrat Supreme Court. I pointed to the *Wallace* case and the refusal of the justices or any of them to disqualify as evidence that the court was politically biased and politically motivated. I charged that such arrogance was the direct result of a century of virtually absolute dominance of the court by a single political party; to-wit, the Democratic Party. My remarks were such that each incumbent Democrat on the court was likely to be personally offended thereby. I have reason to believe that each member of the court followed my campaign and was well aware of my campaign statements and campaign tactics.

During the course of my campaign, the hearings of the Tejeda Committee continued. According to published reports, the activities of that committee concentrated upon the activities of the Honorable C. L. Ray and another justice. I have numerously commented on the Tejeda hearings and the conduct of Justice Ray as outlined in published reports of testimony before that committee. I incorporated newspaper clippings concerning the activities of the Tejeda Committees into my campaign literature and distributed a large number of copies thereof. In my appearances before the public and before the media, I numerously and repeatedly discussed the Tejeda Committee hearings, making repeated mention of Justice Ray. I deplored the fact that he had joined in the filing of a defamation suit against a former briefing attorney of the court declaring that such lawsuit was a flagrant and obvious attempt to coerce that briefing attorney and other persons similarly situated into silence. I further deplored the fact that Justice Ray solicited funds to cover the expense of the lawsuit from attorneys practicing before the court.

When the Chief Justice proposed that the matter be turned over to the Judicial Conduct Commission, I applauded the suggestion. The Judicial Conduct Commission finally issued reports dated June 8, 1987 which substantiated many of my contentions.

The name of Justice Spears was also brought into the Tejeda Hearings. According to published reports, a former briefing attorney testified that Justice Kilgarlin brought an attorney into Justice Spears office on a particular date, borrowed Justice Spears' personal work file and allowed the attorney to examine it. Testimony was also given that on another occasion, a briefing attorney complained to Justice Spears about ex parte conversations that Justice Ray had engaged in with a particular attorney. Justice Spears reportedly advised the briefing attorney that the complaint was well founded. I incorporated clippings of this testimony into my campaign literature and spoke numerously concerning this matter criticizing Justice Spears for his failure to take affirmative action concerning the matter.

Early in the year 1987, the case of *Texaco, Inc. v. Pennzoil Company*, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1987) was decided by the Court of Appeals at Houston. During the summer of 1987, the case was brought to the Texas Supreme Court on application for writ of error. The case involved one of the largest judgments in history, around $10 billion. The case received extensive publicity. In particular, considerable publicity was given to the large campaign donations of attorneys involved in the case. Attorney Joe Jamail, counsel for Texaco was identified as one of the most lavish givers of political campaign contributions to judges. The Dallas Times Herald published an article analyzing political contributions received by the nine justices of the Texas

Supreme Court and published a tabulation showing that a small clique of attorneys had given to the membership of the Supreme Court well over a million dollars in campaign contributions. Mr. Jamail and other attorneys identified with the Texaco case were prominent on the Times Herald tabulation.

Shortly before the end of the year, the Supreme Court, without conducting any kind of hearing and without issuing any kind of opinion refused to grant a writ of error in the Texaco case on its merits even though it was undoubtedly the largest case ever to come before that court. A great deal of adverse publicity ensued, particularly in the Wall Street Journal and in Eastern newspapers. It was widely intimated that the court's decision not to hear Texaco was attributable to the massive political contributions which had been received from both sides of the case.

On December 6, 1987, the CBS television network program "Sixty Minutes" presented a feature on the Supreme Court and its members entitled "Justice for Sale?" That television program concentrated upon the large contributions received by members of the court, upon Mr. Jamail who had been dubbed "the man who bankrupted Texaco," and heavily implied that the justices of this court might well have been influenced in their conduct in the Texaco case and other cases by the fact that they had received massive contributions from a small group of lawyers.

I had received almost 45% of the vote at the November, 1986 election. During the next 14 months I remarked to various friends and supporters that the fact that I had come close in my 1986 race had left me with the desire, if I was able, to make another race in 1988. I was identified several times in the news media as a probable Republican

candidate for the Supreme Court at the 1988 elections.

Finally, on December 8, 1987, I came to Austin, held a press conference and issued a news release, copies of which were shortly thereafter distributed to the news media throughout the state. I announced that I would be a candidate in the Republican primary for Place 3 on the court then held by Raul Gonzalez. I was quoted in the news release and in the media as stating that the time for judicial reform had come. I declared "the Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and 'Sixty Minutes.' " I declared that the case had put the judges on the spot and that, either way they ruled, they were bound to make some of their big money backers mad. I accused the court of pulling a "cop-out" by refusing to hold a formal hearing in a case involving billions of dollars, thousands of Texas jobs, hundreds of thousands of shareholders plus Texaco customers, dealers and suppliers around Texas and around the nation. I stated that Texas has suffered too long from a one-party judicial system controlled by a handful of lawyers and predicted that victory would be ours in 1988 because the people are demanding an end to a one-partisan judiciary and the good old boy system.

After that date, I made several public appearances and was interviewed by a number of reporters from newspapers, radio and television. I repeated the foregoing remarks and made similar remarks. I distributed numerous transcripts of the "Sixty Minutes" television program, usually highlighting the portion where the man who bankrupted Texaco bragged to a national television audience that "I've given to all of the Supreme Court justices, Gonzalez, everybody." My remarks have received widespread media attention.

Although I made a public announcement of my candidacy for the so-called Gonzalez seat on December 8, 1987, I did not immediately proceed to officially file as a candidate or pay the filing fee. Within a few days, rumors were being relayed to me by Republican friends that certain of my critics within the Republican party considered that my candidacy was too controversial and that the Honorable Barbara Culver, then a district judge at Midland, was being pressed to file against me in the Republican primary.

In order to check out these rumors, I contacted Judge Culver by telephone on at least two instances. In the first instance, I repeated the rumors that I had heard and asked her if she was planning to run against me in the Republican party for the Gonzalez seat. She confirmed that she had been approached and urged to make the race. In return, I urged to her that if she wished to be a candidate for the Supreme Court in 1988, that she should engage in a primary contest with Judge Nathan Hecht, whom I had decisively defeated in the 1986 Republican primary as opposed to running against me, the victor in that primary. Judge Hecht was then an announced candidate in the Republican primary for Place 2, the Kilgarlin seat. Judge Culver indicated to me in return that the persons pressing her to make the race would not support her in a race against Judge Hecht. She stated that she had not reached a decision on filing for the Gonzalez seat but that she would make her decision very shortly. I requested that she extend me the courtesy of advising me of her decision as soon as it was reached and she stated that she would do so. Receiving no further communication from Judge Culver, I continued to contact her. She continued to respond indecisively stating in our final conversation just a few days before the January 4, 1988 filing deadline that she was probably "out of it" unless there was "some major new development." Not convinced that Judge

Culver was being entirely forthright, I continued to inquire and cause inquiry through various Republican party sources as to Judge Culver's probable intentions. I was informed that the persons who were pressing Judge Culver to run were primarily Republican friends of Justice Gonzalez, that such friends had, in fact, urged Justice Gonzalez on more than one occasion to switch to the Republican party but that he had refused to do so. According to my information, the persons pressing Judge Culver to run against me in the Republican primary really preferred that Judge Gonzalez not be opposed by the Republican party at all. I was told that Justice Culver was merely a so-called "hatchet man" candidate who would not file in the Republican primary at all unless I filed.

As the filing deadline drew near, my sources informed me that Justice D. Camille Dunn of the First Court of Appeals at Houston was contemplating entering the Republican primary for the Kilgarlin seat making her a Republican primary contestant with Judge Nathan Hecht. I was informed that as soon as Justice Dunn made her intentions known, that the same persons as were pressing Judge Culver to run against me for the Gonzalez seat had approached Justice Dunn and urged her to switch her announced plans and to run against me for the Gonzalez seat, Justice Dunn being assured that if she targeted the Gonzalez seat instead of the Kilgarlin seat, that Judge Culver would drop out of contention.

During the fall of 1987, Chief Justice Hill announced his intention to resign from the Supreme Court effective January 4, 1988 and the Governor had announced that he would appoint the Honorable Thomas R. Phillips, a Republican, to succeed Chief Justice Hill. Under Texas law, the vacancy was required to be placed on the ballot at the next general election, meaning the 1988 general election ballot. This meant that four seats on the Supreme Court would be on

the 1988 election ballot. Under the law, the deadline to file for all four seats was Monday, January 4, 1988 at 6:00 p.m.

I arrived at State Republican Headquarters a little after 4:00 in the afternoon. I announced that I had come to file for office for a seat on the Supreme Court. I repeated the various rumors that I had heard and stated that such rumors had caused me to rethink my declared intention to run for Place 3, the Gonzalez seat. I stated that I had come to the conclusion that Judge Culver or some other person unknown to me had been recruited as a "hatchet" candidate and that such candidate was hiding in the woodwork (possibly in the hotel across the street) ready to pounce upon me as soon as I filed for the Gonzalez seat. I had already checked and been informed that as of the time of my arrival at Republican headquarters, there was no officially filed Republican candidate for the Gonzalez seat. I declared that I had concluded that if I must be involved in a contested primary, that I had decided that I had would engage in a primary contest for the chief justice's seat with the Honorable Thomas R. Phillips as my primary opponent. I stated that I considered the Honorable Justice Phillips to be vulnerable because he was an advocate of appointive judges rather than elected judges, the selection of judges by appointment being, in my opinion, not popular with the voting public in Texas. I further declared that I considered Chief Justice Phillips to be vulnerable on the issues of maturity and experience.

Chief Justice Phillips had taken the oath of office as an appointee earlier in the day and had also officially filed in the Republican primary to succeed himself. He was immediately informed of my announced decision to enter the Republican primary as a candidate for chief justice, the person calling him probably being Mr. John Weaver. Chief Justice Phillips dispatched a campaign lieutenant, a Mr. Carl

Jordan to Republican headquarters to act on his behalf. Various discussions ensued between me, my aides, Mr. Jordan and party officials. A concerted attempt was made to convince me not to run for chief justice. I remained adamant. Finally within mere minutes of the 6:00 P.M. o'clock deadline, I received assurances from all persons present that Judge Culver would not be a candidate for any place on the Supreme Court, that Justice Dunn would be a candidate for the Kilgarlin seat and that there was no other Republican candidate, either actual or potential for the Gonzalez seat. As soon as I decided that the assurances to me were accurate, I delivered to the state chairman my official application for place on the ballot plus the proper filing fee. My filing was completed not later than ten minutes prior to the filing deadline of 6:00 o'clock p.m. on January 4, 1988. I thereby became a candidate, unopposed in the Republican primary, for Place 3, the Gonzalez seat on the Texas Supreme Court.

My rivalry with the Honorable Chief Justice did not commence with the 1988 election. On information and belief, he is a long time friend and confidant of the Honorable Nathan Hecht. Even though it is a strong principle among Republicans (commonly referred to as the "Eleventh Commandment") that no candidate or office holder will become involved in a contested primary election other than his own, Chief Justice Phillips never-the-less gave $100.00 to the 1986 Nathan Hecht primary campaign, knowing at the time that Judge Hecht was being actively contested at the 1986 Republican primary by the affiant, Charles Ben Howell. In all of my political experience, I can only recall one other instance where a Republican officeholder has given money to my opponent in a contested Republican primary. In all likelihood, Chief Justice Phillips further assisted Judge Hecht in raising substantial other contributions and support so that he, Judge Hecht might run against me in the 1986 Republican

primary. The Chief Justice is from Houston whereas Judge Hecht is from Dallas. The Chief Justice was of great assistance to Judge Hecht in the Houston area in 1986.

Inasmuch as he was a friend and confidant and booster and contributor of Judge Hecht at the 1986 election, it may be logically concluded that, in all likelihood, Chief Justice Phillips was greatly incensed over the fact that I brought suit against Judge Hecht over his defamatory tactics. On information and belief, The Honorable Thomas R. Phillips was active in the 1986 primary election campaign between myself and Justice Hecht in which I decisively defeated Justice Hecht in spite of his false attacks that culminated in a libel suit, now pending. As a partisan for Justice Hecht, the Honorable Thomas R. Phillips cannot be fair and impartial in an action where I am a party.

During the 1986 Republican Primary election, Justice Hecht deliberately persisted in circulating numerous false statements about me, including contentions that I had been almost disbarred twice, and that I had been found guilty of making false statements to a judge in a divorce case. He refused to desist or retract even though requested to do so. I therefore brought suit against him for libel during April, 1986, in the 14th District Court of Dallas County, Texas, cause no. 86-05369. The case has not been fully disposed up to this date. Chief Justice Phillips was greatly incensed over the fact that I brought suit against Judge Hecht.

Following my moves to become his political opponent in 1988, the Honorable Justice Phillips exhibited the fact that he had formed a bias and prejudice against me, affiant Howell and manifested that he had determined that he, the said Chief Justice Phillips, did not care to have this relator, Charles Ben Howell, as a colleague with him on the

Supreme Court. To this end, the said Chief Justice undertook to stir up adverse publicity against relator for the motive and purpose of causing relator's defeat as a candidate for the Supreme Court.

With the aforesaid objective in mind, the Honorable Chief Justice, on or about March 28, 1988, contacted the staff of Texas Weekly, a publication circulating throughout the State of Texas which concentrates upon distributing news items concerning public officials and political events. Pursuant to his own request, the said Chief Justice was interviewed by one or more members of the staff of the said Texas Weekly.

As the principal topic of the interview, the said Honorable Chief Justice stated that no one should count upon him to engage in "chatting up" the entire Republican reform slate of Supreme Court candidates. Chief Justice Phillips stated as a generality that he would decline to endorse any of his party colleagues. However, he went on to further and pointedly declare that he would not be any part of encouraging a vote for Charles Ben Howell. In order to further and specifically disparage the candidacy of relator, the Honorable Chief Justice stated by way of example that if, at the State Republican Convention he were lined up for a joint photograph with other Supreme Court candidates, "that would not be an endorsement" of the candidacy of this relator, Charles Ben Howell. The Honorable Chief Justice further commented that the Republican Party might well mount a slate campaign for Republican Supreme Court candidates but he predicted that petitioner Howell would not be included in any part of such group effort. The Honorable Chief Justice further stated that petitioner Howell is regarded as too much of a maverick for the party organization to support petitioner's candidacy. The Chief Justice concluded by

declaring that Governor Clements may be the only Republican state official to support petitioner's candidacy.

As the Honorable Chief Justice was well aware, there were five Republican candidates for the Supreme Court besides himself. In his said interview, the Honorable Chief Justice omitted to mention any of them by name except petitioner Howell. Instead, he continuously repeated the name of this petitioner so as to convey the message that he was avoiding endorsements or slate campaigning for the principal reason, if not the sole reason, of avoiding any association whatever with this petitioner.

In his interview, the said Honorable Chief Justice further undertook to convey the impression that petitioner is a pariah or outcast of the Republican Party, that Republican officials are opposed to petitioner's candidacy and that Republican voters should avoid voting for or otherwise supporting petitioner's candidacy.

Because of the aforesaid rivalries and controversies between this affiant and the Honorable Thomas R. Phillips and the Honorable Nathan Hecht, and because those differences, controversies and political conflicts continue to this date, affiant submits that it would be improper for either of them to sit in judgment upon the within application for writ of error filed by this affiant. To the extent required by law, affiant states under oath that the said Honorable Thomas R. Phillips and/or the said Honorable Nathan Hecht should each or both recuse themselves in this proceedings in that their impartiality might reasonably be questioned in that they have a personal bias or prejudice concerning this affiant, Charles Ben Howell, a party hereto or the subject matter of the within lawsuit.

Other than Chief Justice Phillips, Justice Hecht and Justice Cook, each of the justices of the Supreme Court, named above and of whom recusal is hereby sought is, each of them, a political ally of the Honorable Oscar Mauzy in that each of them has been, for the major part of his adult lifetime, actively involved in Democratic politics. They have each continuously been active in Democratic Party affairs and have worked for and have contributed and have publicly supported the candidates of the Democratic Party. They have numerously been candidates for office at the Democratic primary. They have served as Democratic officeholders in various capacities and they presently serve as Democratic officeholders and were, each of them, elected to the Supreme Court as a Democrat or were, each of them, appointed to the Supreme Court by a Democratic governor or were both elected and appointed as a Democrat. Those of them who achieved office by appointment actively sought to secure appointment from a Democratic governor. All such appointments were in part given to the recipients in recognition of previous activities in behalf of the Democratic Party and its candidates and upon the endorsement and support of persons active in Democratic politics. The aforesaid six justices had further sought office on numerous occasions by filing for the nomination of the Democratic Party in its primary and in campaigning for and securing such nomination and in representing the Democratic Party thereafter as one of its candidates at the general election.

Not only is politics intrinsic to this lawsuit, but a close personal working relationship is also believed to exist between the respondent, Justice Mauzy and most, if not all of the other eight justices addressed herein. Each member of this court has a close working relationship with each other justice, meeting and visiting with his colleagues almost daily. For instance, I was present in the Texas Courts Building on the

Capitol Grounds at Austin on Wednesday, April 26, 1989 to hear the argument of the within case before the Court of Appeals for the Third District at Austin. I observed Justices Cook, Doggett and Hecht returning to work about 1:15 PM after having eaten lunch together. Such relationship and the inevitable social contacts inherent therein create an atmosphere which is not conducive to detachment or to fair and impartial decision making, insofar as the within suit against an incumbent member of the Supreme Court is concerned.

The close political and working arrangement between the justices is illustrated by the relationship between Justice Mauzy and Justice Doggett. Justice Mauzy served for eighteen years in the Texas Senate during which time he became the acknowledged leader of the liberal wing of the Democratic majority. Justice Doggett served in the Senate with him and was one of his chief lieutenants. During the 1979 legislative session, the two of them hid out in a garage apartment for a number of days while the Texas Rangers were searching for them in order to arrest them and bring them before the Senate in order to secure a quorum. This affiant cannot obtain a fair and impartial hearing before the Honorable Justice Doggett in an action challenging the political conduct of respondent Mauzy.

This affiant and the Honorable Justice Mauzy are currently engaged in litigation in that petitioner has pending suits against Justice Mauzy and his wife, who acted as his campaign treasurer, also charging said defendants with violation of the provisions of the campaign contribution and expense disclosure laws contained within the Texas Election Code. That suit was filed in Dallas County as Charles Ben Howell, et al v. Oscar Mauzy, et al, Cause No. 86-13,909-G in the 134th District and it is now pending in Travis County on

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change of venue.

The within lawsuit is a political lawsuit in that it grew out of the election campaign between affiant and Justice Mauzy. Affiant charges Justice Mauzy with engaging in a willful and deliberate money laundering scheme during his campaign for office in an effort to hide the fact that he had obtained a $225,000 bank loan to finance his campaign. Affiant further charges that defendant Mauzy diverted a substantial amount of political contributions to his own personal use, and charges him with various other violations of the campaign disclosure act. In addition to the substantial amount of the statutory double damages and attorneys fees in issue, the loser will sustain extensive negative publicity and political damage. Defendant's colleagues, particularly his Democratic colleagues, will possess no natural sympathy for petitioner. On the contrary, the members of this Court will feel considerable natural sympathy for defendant Mauzy.

Each member of this court, particularly the Democratic members, is, in all likelihood, aware of the facts of the underlying lawsuit by reason of having visited with Judge Mauzy about the case on one or more occasions. Such ex parte conversations are disqualifying in and of themselves. In addition, Justice Mauzy has disparaged petitioner to his colleagues from time to time falsely contending that petitioner has filed suits against all of his opponents and that every lawsuit filed by petitioner against a political opponent has been baseless and frivolous.

The Honorable Raul Gonzalez is further and particularly disqualified to participate in this case on account of the mutual rancor and bitterness of the 1988 political campaign between petitioner and Justice Gonzalez. Justice Gonzalez spent the months of July through October touring

the State. He repeatedly made false and distorted charges against petitioner. In particular, he repeatedly declared to his audiences and to the attending media that petitioner is a "Kook."

The major media event of the campaign was a judicial forum conducted on the campus of the University of Houston on October 13 and televised both directly and on tape across the state through various broadcast and cable systems. Justice Gonzalez proceeded to declare on television that this petitioner is a "Kook."

Affiant was prepared for the onslaught. I removed two signs from my briefcase. One sign, I placed around my own neck identifying myself as "Judge Kook." The other sign lettered to read "Judge $1,514,710" I offered to Justice Gonzalez to represent the amount of contributions that Justice Gonzalez had received from special interest groups and others. He refused to accept the placard and complained bitterly to the attending media representatives that my campaign tactics were unfair. The University of Houston judicial forum became a focal point during the remainder of the campaign.

The Honorable Chief Justice and Justice Cook also became indignant and upset by the "Judge Kook" incident at the judicial forum. They were interviewed by media immediately after the program and before leaving the premises. They declared that my reaction to Justice Gonzalez' invective was totally uncalled for. Justice Cook denounced it as unbecoming to a race for the State's highest court. Strangely, they had no criticism whatever for Justice Gonzalez' invective against me. I didn't conjure up the name for myself; never at any time during the campaign did I ever apply any epithets to my opponent. Chief Justice Phillips

made a point of declaring that he was no part of my campaign declaring "This is a good example of why I'm pleased that I'm just running my own race." Justice Cook expressed outrage and concern that the public would confuse "Judge Kook" with Justice Cook.

The campaign continued to deteriorate. Justice Gonzalez' campaign tactics became ever more shrill. Finally, he began running television ads picturing me as a jailbird. The ad was based on a contempt of court citation relating back seventeen years. Of course, the age of the charge and the particulars thereof were not mentioned. I finally concluded that his tactics were utterly in violation of the rules and statutes regulating the conduct of judicial elections. On November 2, 1988, I filed a complaint against my opponent with the Commission on Judicial Conduct.

The Commission, composed of eight Democrats (including the chairman) and three Republicans refused to conduct an emergency hearing as I requested. Instead, they held the matter until their next regular meeting on December 2 when they voted to dismiss. At no time did the Commission ask me to appear or to submit my documentation. I have information to the effect that the complaint was also dismissed without inquiry to Justice Gonzalez as to his response, if any to the claims filed against him.

The attitude of the Honorable Raul Gonzalez toward me is exemplified by his comments to the media. On the day after the election, when advised that he had received 53.9 percent of the vote, he declared "Given the opposition, I would've expected to have done better." Following the announcement of the Commission decision, he declared to the Associated Press on December 21 "It's unfortunate that we have people like Charles Ben Howell who don't know

when to quit."

Petitioner would show that each justice of this Court has a direct pecuniary interest in ruling against petitioner in the within litigation. The cost of campaigning for a seat on the Texas Supreme Court is extremely high, running between $500,000 and $2,000,000 for successful 1988 campaigns. Based on past performance, said justices can each of them anticipate the very real prospect that petitioner will be a candidate for the Supreme Court a minimum of at least twice during the 1990-94 period, and possibly thereafter. Anything that any of them can do to stir up adverse publicity against petitioner will constitute employment security for the incumbent members of the Court. This statement is applicable to Democrats and Republicans alike.

Petitioner would further show that each justice herein is acting in his own case to the extent that any precedent adverse to petitioner will be helpful in defending the positions of the respective incumbent justices at subsequent elections.

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113.

[Petitioner's] Verified Exhibits in Support Of Motion for Recusal or Disqualification
[Filed 22 JA 88]

[News Article,] TYLER (TX) MORNING TELEGRAPH

THURSDAY, MARCH 6, 1986, sec. 1, p. 13

AUSTIN (UPI)—Chief Justice John Hill of the Texas Supreme Court bristled Wednesday when an attorney requested that the entire court recuse itself from hearing a case involving Justice Jim Wallace and his opponent, appeals court Judge Charles Ben Howell of Dallas.

Athens attorney Howard Patterson, who represents Howell, said the Democratic-dominated court would give the appearance of bias if it heard the case involving Howell, a Republican.

"We are a legal court, a law court. We do not make our decisions based on politics," Hill said. "We makes rulings based on the law. Politics plays no part in our decision making."

Wallace, who did not participate in the hearing, filed a lawsuit alleging that Howell improperly filed for Wallace's Place 3 position on the court without properly withdrawing his application for Place 1.

[Ver. Exhs. 11]

[NEWS RELEASE]

March 12, 1986
Immediate Release

For additional information:
Judge Charles Ben Howell
(214) 823 8400 (214) 749 6924

HOWELL ATTACKS UNFAIR RULING

Republican Judge Charles Ben Howell, now on the Texas Court of Appeals at Dallas, and seeking a seat on the Supreme Court, had harsh words for today's Supreme

Court ruling that removed his name from the ballot as a candidate for Place Three. "It sure looks hard for a Republican candidate to get a favorable ruling from an all-Democratic court," Howell said. "First they threw Buster Brown off the ballot as a candidate for Attorney General and now they have done it to me."

"When Senator Brown got thrown off the ballot, he gave up. I can't blame him, but I assure you that I will not give up—not until the highest court in the land has agreed that I am ineligible."

"How was it possible for me to have a fair trial when everyone on the bench was a political activist for the opposing party? Furthermore, these judges are my opponent's fellow workers, his cronies, his day to day associates. The United States Supreme Court has held again and again that a fair and unbiased tribunal is a cornerstone of due process. I have been denied Due Process of Law."

Howell pointed out that the Texas Constitution provides for the governor to appoint a special court to hear the case where the Supreme Court is disqualified (Article 5, Section 11) and argued that the Supreme Court should have followed such procedure in his case. Last Wednesday, March 5, when Howell's attorney, Howard Pattison of Athens asked the court to disqualify itself, the Court forcefully rejected the suggestion, refused to hear further argument on the point and ordered Pattison to talk about something else. "Sometimes, the truth is too painful for people to hear," Howell said. "If there ever was a case for the use of this constitutional provision, this case, where one of the court's own members is suing his political opponent, is the case."

Howell promised that he and his lawyers would go

to work immediately to take the case into federal courts. He declined to state definitely where or when his federal case would be filed. He explained that it would require time to study the matter. He stated that it is possible to go directly to the United States Supreme Court or that he might choose to go to the United States District Court. In view of the approach of the election, he was emphatic that a decision would be reached promptly. "We will file our federal case within ten days or less," he predicted.

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[Ver. Exhs. 12]

[News Article,] THE TEXAS LAWYER [Austin, TX]

April 2, 1986, p. 1

HOWELL SUES TEXAS SUPREME COURT

Special to TTL

HOUSTON—Rebuffed by the Texas Supreme Court, Dallas Court of Appeals Justice Charles Ben Howell has turned to federal district court here in his bid to challenge incumbent Texas Supreme Court Justice James Wallace.

Howell filed suit March 25, seeking to overturn an order of the Texas Supreme Court March 12 that Howell must run for Place One (incumbent Justice Sears McGee's position) instead of Place Three (Wallace's spot). The Texas court held that since Howell originally filed for Place One and attempted to condition his withdrawal from Place One on his acceptance on the ballot in Place Three, he had effectively filed for two positions in violation of the Election Code.

His federal suit claims that the Supreme Court should have recused itself from hearing the case since Wallace, a member of that court, was Howell's political opponent. Howell specifically faulted Chief Justice John L. Hill, Jr., for ignoring the disqualification issue in the five-page opinion.

"Sometimes the truth is so painful that people will not mention the subject," Howell said in a prepared statement. "However, the issue simply will not go away." The federal complaint charged that Howell could not get a fair and impartial hearing from an all-Democratic high court when "everyone on the bench was a political activist for the opposing party." Howell is a Republican.

He also chided the court for deciding a case brought by a fellow worker, calling them "day to day associates and cronies of the judge who filed the Supreme Court petition."

In the case, Wallace and McGee did not participate in the decision, Justice Raul Gonzalez dissented and would have permitted Howell to remain in Place Three.

Howell said the Texas Constitution provides for the governor to appoint a special Supreme Court panel to hear any case in which regular judges are disqualified (Article 5, Section 11).

"How was it possible for me to have a fair and impartial trial under these circumstances?" he asked. "If there ever was a case of the use of this constitutional provision, this is the case."

He claimed that the Supreme Court applied a strict standard when construing the papers he filed to be placed on the ballot when, at the same time, applying a "relaxed or liberal standard to Judge Wallace's papers."

[Ver. Exhs. 30]

[News Article,] DALLAS TEXAS HERALD

Friday, April 25, 1986, p. 25A

LETTERS—COURT'S ACTIONS TRANSPARENT

To the Editor:

The Times Herald has reported legislative testimony by Chief Justice John Hill insinuating that someone provided me with an advance leak as to "the timing and result" of the suit brought by his Democratic fellow judge, Jim Wallace, to throw me off the Republican primary ballot as a candidate for Judge Wallace's seat. I can't know what kind of advance information about the case was given to Judge Wallace, who is there every day, but any notion that this Republican judge from 200 miles away in Dallas received inside information from this all-Democratic court is absurd on its face.

As soon as the hearing was concluded on March 5, I did visit with several media representatives, including Patti Kilday from the Times Herald, and made several predictions concerning the case.

I predicted that the decision would be be announced exactly one week later, on March 12 (a correct but

easy prediction). I predicted that the judges would permit their co-worker and fellow Democrat to win the case. (This prediction took no ouija board.)

I predicted that Judge Kilgarlin would write the court's decision because he is generally viewed as the most politically oriented judge on the court. I further stated that it is a tradition on the U.S. Supreme Court and most state supreme courts for the chief justice, a show of solidarity, to sign decisions for the court when cases are contentious or controversial. If Kilgarlin did not author the decision, I predicted that Hill would (Hill did).

I predicted that when the opinion was delivered, it would not contain a single word about my No. 1 contention, that the Supreme Court was disqualified to hear this case and that the governor should be asked to appoint a special bipartisan court as provided in the Texas Constitution (100 percent correct).

I also predicted that Judge Gonzalez has a tough election battle on his hands, that he would disassociate himself from this injustice, and that he would write a dissent, just as he did in the throw-Buster-Brown-off-the-ballot case only a few weeks previous (correct again). I stated that Judge Campbell also was facing a tough election and he might join in the dissent, but I further stated that Judge Campbell does not have a reputation of being highly motivated, and my best estimation was that he would not dissent (he didn't).

My analysis is that some members of the media have related my prognostications, freely and openly made, back to Judge Hill and he now suspects that I have a "deep throat" within the court. Ridiculous! These gentlemen just don't realize how transparent their actions are when they

insist on presiding in a case where their conduct is subject to question. I suggest that the Texas Supreme Court did not regain any of its lost integrity in the throw-Judge-Charles-Ben-Howell-off-the-ballot case.

CHARLES BEN HOWELL

Dallas

[Ver. Exhs. 31]

[News Article,] DALLAS TIMES HERALD

Monday, May 5, 1986

HOWELL WINS FIGHT WITHOUT SWITCHING

By FRANK BURGOS
Staff Writer

Two months ago, Dallas appeals justice Charles Ben Howell unleashed spirited criticism of the Texas Supreme Court for not allowing him to switch his high court candidacy from Place 1 to Place 3.

But Saturday, it was clearly a moot issue.

For Howell, who had tried to switch his candidacy to Place 3 so he could run unopposed, Place 1 did not pose much of a problem after all.

The colorful and sometimes controversial appeals court judge won easily over heavily favored Dallas District Court Judge Nathan Hecht with 60 percent of the vote after a bitter contest.

Howell, who once was accused of wearing pajamas in court, said people who expected Hecht to win, "were reading the tea leaves according to the man who could raise the most money. They didn't prove out in this race. . . . I think that's a good sign."

In November, Howell will face whoever wins the June 7 runoff in the Democratic primary. With the defeat of incumbent Justice Sears McGee, the contest for the Democratic ticket is now between Dallas State Sen. Oscar Mauzy and San Antonio Appeals Court Judge Shirley Butts.

Howell originally filed in Place 1 for a chance to challenge McGee in the general election. Only minutes before the filing deadline, however, he switched to Place 3.

"I wanted to avoid a primary contest," said Howell, who has run for public office several times since 1961 but won his first political contest in 1980 with a spot on state district court.

"I was running on a shoestring," he said. "I wanted to conserve my resources for the main event."

But the state Supreme Court squashed the move, saying his application for Place 1 was already on file. Howell now attributes his victory to the court's decision.

"I think part of my win was due to the indignation of the Republican voters to the way Texas Supreme Court treated me," Howell said.

He said the ruling was "a political hatchet job. . . . The Democratic party has monopolized the Texas Supreme

Court for more than 100 years."

If he wins, Howell doesn't expect his stern criticism of the court to make him ineffective with his brethren.

"One strong voice, even though outnumbered, may create an impetus among the other jurists to straighten up and fly right," he said.

Howell often has been embattled during his 25-year political career.

In 1974, he sued the State Bar of Texas for $2 million after the organization tried to disbar him. Howell said his suit, which charged the bar association with conspiracy, was reason for his recent poor showing in the Dallas Bar Association judicial evaluation poll.

In this election, he filed a $1 million libel lawsuit against opponent Hecht, charging him with spreading "a continuing series of distorted, scurrilous and untrue statements."

Hecht, in letters to Republican leaders, had said Howell has "worn pajamas in court."

Now that he has won the election, Howell said he is not certain he will go ahead with the libel suit. He also admitted he did wear pajamas to court several years ago when he was called to Judge Dee Brown Walker's chambers, but only because he was ill with the flu and "they rousted me out of a sick bed."

[Ver. Exhs. 32]

NEWS RELEASE

File Date: December 8, 1987 For Additional Information:
11:00 a.m. Judge Charles Ben Howell
Release: Immediate (214) 823-8400

AUSTIN, TX.—Dallas Appeals Court Judge Charles Ben Howell today became the first Republican candidate to formally announce for a seat on the Texas Supreme Court. At 10:00 this morning, he filed papers with the Secretary of State declaring that he is a candidate for place three on the court, now held by Raul Gonzalez.

"The time for judicial reform is here and now," Howell declared in a press statement made immediately afterwards. "The Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and '60 Minutes.' "

"I don't want to comment about the merits of a case that is still in litigation," he said. "I do declare that the manner in which Texaco was handled by the Supreme Court was a disgrace. First of all, the judges, practically all of them, have taken gobs of money in contributions from both sides. Political contributions in the $50,000 range from a single law firm are downright obscene.

"Obviously, this case put the judges on the spot. Either way they ruled, they were bound to make some of their big money backers mad. What do they do? They pulled a cop-out. They refused to hold a formal hearing; they refused to allow the lawyers to appear in front of them and argue the case; they refused to prepare a judicial opinion explaining their reasons for deciding the case. Instead, they discussed the

case in the back room and instructed the court clerk to issue a one line announcement that the Supreme Court had refused to become involved on account of supposed 'no reversible error.' Is this the proper type of justice to dispense in the largest, most highly publicized case ever to come before the court?

"Texaco v. Pennzoil involves not only billions of dollars, enough money to pay $1,500.00 to every registered voter in the State of Texas—it involves thousands of Texas jobs, hundreds of thousands of shareholders, in Texas and around the world. Counting all of Texaco's customers, dealers, and suppliers, the Texaco case involves the entire Texas economy.

"What did the Texas Supreme Court have to say when this blockbuster case came to it? Nothing!! It sent the parties away empty handed. Apparently, the judges want us to believe that they were too busy. I say, they should never be too busy to concern themselves with justice and the welfare of the entire state.

"The reason the court refused to get involved is obvious. It had political IOU's outstanding to both sides. However, the biggest contributions came from the Jamail-Pennzoil side. The court put political expediency ahead of its duty. The judges copped out in favor of their pocketbooks.

"Too long, Texas has suffered from a one-party judicial system controlled by a handful of lawyers. Texas needs judicial reform. Judicial reform begins at the ballot box. Those who live by the established system will never agree to meaningful reform. I intend to become one of the first Republicans in this century to be elected to the Supreme Court in his own right; I intend to change things on our

highest court."

Judge Howell ran for the Supreme Court in 1986. With a $50,000 campaign fund, battling against an opponent with one and one-half million, Howell garnered almost 45% of the vote. "We intend to do a little better in '88," Howell declared.

He was one of the first persons in modern times to campaign for judicial office on the Republican ticket. Elected as a district judge in 1980, he was re-elected in 1982. In 1984, Judge Howell moved up to the Court of Appeals making him a three time winner—each time with a larger margin of votes. "Victory will be ours in 1988; the people are demanding an end to a one-partisan judiciary and the good old boy system that is irrevocably tied to it."

* * * 30 * * *

[Ver. Exhs. 50]

[News Item,] TEXAS WEEKLY (Austin, TX)

March 28, 1988

CHIEF DOESN'T WANT TO KILL THAT INDIAN

Don't count on appointed Republican incumbent Chief Justice Tom Phillips to sit around chatting up the entire GOP "reform" slate of Supreme Court candidates. Given a chance or three, Phillips declined to endorse any of his party colleagues—but especially avoided any suggestion that he would be part of encouraging a vote for Charles Ben Howell. Phillips even went so far as to say that if, for example, at the state Republican convention in June he and the other

Supreme Court candidates were lined up for a joint photograph with their arms around each other, "that would not be an endorsement" of Howell's candidacy.

[Ver. Exhs. 50]

[News Article,] DALLAS TIMES HERALD

Monday, April 11, 1988, p. 1B

JUDICIAL CANDIDATE THREATENED RETALIATION

AUSTIN—Charles Ben Howell . . . threatened retaliation if state GOP officials let another candidate oppose him in the March 8 primary election . . . [according to] a 30 page . . . affidavit in a lawsuit in which he is involved . . . [which] affidavit is part of his effort to have all justices—seven Democrats and two Republicans—disqualify themselves from deciding the lawsuit now on appeal . . . [which] involves the sale of land in Dallas County.

Only minutes before the Jan. 4 filing deadline, Howell met with high-ranking state party officials and warned them that if he had a primary opponent he would switch races and run against the newly appointed chief justice, Thomas Phillips, who was unopposed. . . .

. . . . . .

Rumors began reaching him late last year that state party officials were unhappy . . . that he would oppose incumbent Democrat Raul Gonzalez . . . , Howell said in his affidavit.

"Within a few days, . . . [I heard] that the Hon. Barbara Culver . . . was being pressed to file against me in the

Republican primary," Howell said. . . .

"I was told that Justice Culver was merely a so-called 'hatchet man' candidate who would not file . . . at all unless I filed."

Culver confirmed she had been approached about making the race and said she talked with Howell several times. . . . [S]he [finally] opted not to run for Gonzalez's seat . . . [and was subsequently] appointed to a vacancy on the court by Republican Gov. Bill Clements. . . .

. . . . . .

Howell's affidavit goes on to say he decided that if he had to have an opponent in the GOP primary, it would be Phillips. . . . He showed up at the state party offices here . . . two hours before the filing deadline—and told . . . the executive director, what he had decided. . . . An aide to Phillips came to the party offices to join the talks.

. . . . . .

Within only minutes before the deadline, the judge said, he was convinced he would have no opponent if he stayed in the race for Gonzalez's . . . seat. . . . He had no opposition and the two face off in November.

[Ver. Exhs. 56-7]

[News Article,] DALLAS TIMES HERALD

Sunday, October 9, 1988, p. 25A

TWO SIDES TO HOWELL CANDIDACY

AUSTIN—Even the Republican nominees for the Texas Supreme Court are critical of one of their associates, Dallas Judge Charles Ben Howell. . . . Nathan Hecht, one of Howell's colleagues on the Fifth District Court of Appeals in Dallas and a GOP candidate for a seat on the Supreme Court, said Howell is "widely considered an embarrassment to the judiciary and to the Republican Party."

Still, Gonzalez is taking his challenger seriously. "Recent polling," campaign aide Mike Cook wrote recently, "suggests that he is a strong candidate because of his high name identification from his numerous past political races . . ."

. . . . . .

[Ver. Exhs. 58]

[News Article,] McALLEN (TX) AMERICAN

October 19, 1988

JUDICIAL EVENT SPURS DEBATE
AMONG CANDIDATES

HOUSTON— . . . [A] rare gathering of 13 Texas Supreme Court candidates last week definitely was an eye-opener. Highlights included . . . one candidate donning a sign

proclaiming himself as "Judge Kook" . . . after the Democratic incumbent, . . . Justice Raul Gonzalez, called him "a widely recognized kook" . . . during the taping of a television show. . . . Howell responded with claims that Gonzalez had become part of the integrity problem . . . by accepting large contributions from special interest groups.

. . . . . .

[Ver. Exhs. 59]

[News Article,] AUSTIN (TX) AMERICAN-STATESMAN

Friday, October 14, 1988, p. 3B

GONZALEZ HEATS UP SUPREME COURT DEBATE, CALLS RIVAL A 'KOOK'

HOUSTON—Texas Supreme Court Justice Raul Gonzalez branded his Republican opponent, Charles Ben Howell, a "widely recognized kook" in a Thursday night debate. . . .

. . . . . .

[T]he hardest verbal shot came when Gonzalez . . . took dead aim at Howell and said, . . . "[M]y opponent is widely recognized as a kook."

Gonzalez said Howell "has a reputation of showing up in court in pajamas, he served 30 days in jail for contempt of court, he's been reprimanded for [his?] conduct."

. . . Howell [later] took out a small black sign with white lettering and hung it around his neck. It read: "Judge Kook."

He held up another sign that said, "Judge $1,514,710" which he said was for Gonzalez because that was how much money Gonzalez had accepted from special interest groups.

. . . . . .

[Ver. Exhs. 60]

[News Article,] CORPUS CHRISTI (TX) CALLER-TIMES

November 9, 1988

GONZALEZ LEADS IN RACE FOR HIGH COURT

Incumbent Democratic Justice Raul A. Gonzalez led . . . in early returns yesterday for the Place 5 seat on the Texas Supreme Court.

. . . . . .

"Given the opposition, I would've expected to have done better," Gonzalez said. . . .

. . . . . .

[Ver. Exhs. 61]

STATE COMMISSION ON JUDICIAL CONDUCT
Filed November 2, 1988

COMPLAINT FOR REPRIMAND OR REMOVAL
OF RAUL GONZALEZ, JUSTICE,
SUPREME COURT OF TEXAS

Charles Ben Howell, complains of Raul Gonzalez, Justice of the Supreme Court of Texas and would show:

. . . . . .

MISCONDUCT ALLEGED

ONE: *Acceptance of Influential Contributions from Parties Involved in Pending Litigation.* [Two paragraph allegation]

TWO: *Failure to Make Reasonable Disclosure to the Parties.* [Two paragraph allegation]

THREE: *Making and Failing to Retract an Unsupportable Statement as to His Qualifications.* [Six paragraph allegation]

FOUR: *Failure to Discuss His Contributions with Accuracy, Candor and Fairness.* [Six paragraph allegation]

FIVE: *Failing to Discuss His Opponent's Qualifications with Accuracy, Candor and Fairness.* [Three paragraph allegation]

. . . . . .

[Ver. Exhs. 67-71]

PA 58

[News Article,] DALLAS MORNING NEWS

Thursday, December 22, 1988, p. 24A

By Jack Keever, Associated Press

AUSTIN—Dallas appeals court Judge Charles Ben Howell on Wednesday claimed one victory and one loss before the State Commission on Judicial Conduct.

Howell released a copy of a confidential letter from the commission, which advised him that his news release of Dec. 8, 1987 (PA 49), "did not rise to the level of misconduct."

The release sent to reporters . . . criticized the high court's handling of the Texaco-Pennzoil lawsuit.

. . . . . .

A copy of another confidential letter . . . said the commission . . . was dismissing Howell's complaint [against Justice Gonzalez] "as being without merit."

. . . . . .

"Whitewash," Howell said. . . . "At an Austin news conference on Nov. 4, I predicted that this 8-3 Democratic outfit would do nothing until after the election when they would apply a whitewash job," he said. "Now they have done exactly as I said they would do."

Howell said one of his charges accused Gonzalez of accepting $27,500 from the Texas Medical Association political action committee, then voting in favor of the association on a medical malpractice damages case.

. . . . . .

Responding to Howell's remarks, Gonzalez said, "It's unfortunate that we have people like Charles Ben Howell who don't know when to quit."

"I don't think it merits any further comment," he said.

[Ver. Exhs. 79]

[PROCEEDINGS IN RELATED CASE,
TEXAS SUPREME COURT,
HOUSTON LIGHTING V. REYNOLDS,
No. C-5499.]

[Chief Justice's Certificate of Disqualification]
[Dated May 3, 1988]

The Honorable William P. Clements, Jr.
Governor of Texas . . .

I certify that I am disqualified by the mandatory requirements of Rule 15a(1)(a), Texas Rules of Appellate Procedure, from participating in the determination of cause number C-5499, *Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc.*, now pending before this Court.

Pursuant to Texas Constitution, article V, § 11 and Texas Government Code § 22.005, you are requested to immediately commission a person possessed of the qualifications prescribed for Justices of the Supreme Court to hear and determine this case.

[Ver. Exhs. 3]

[Governor's Appointment of Special Chief Justice]
[Filed June 27, 1988]

The Honorable Jack M. Rains
Secretary of State . . .

Please be advised that pursuant to Article V, Section 11 of the Constitution of the State of Texas and Section 22.005 of the Texas Government Code I am today appointing the following individual to serve as Chief Justice of the Supreme Court of Texas in the matter of Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc., Cause No. C-5499, currently pending before that court:

THOMAS W. LUCE III
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Mr. Luce will serve in the place of Chief Justice Thomas R. Phillips who has certified his disqualification to hear the above matter to me. Please issue a commission to this appointee as soon as he has qualified.

[Ver. Exhs. 4]

[News Article,] DALLAS TIMES HERALD

Saturday, June 4, 1988, p. 1B

[Filed, Microfilm Records, Dallas (TX) Central Public Library]

CHIEF JUSTICE DISQUALIFIES SELF FROM CASE

By Fred Bonavita
TIMES HERALD AUSTIN BUREAU

AUSTIN—Chief Justice Thomas R. Phillips has disqualified himself from a Supreme Court case in which his former law firm is involved and has asked Gov. Bill Clements to appoint a special temporary justice to take his place.

Phillips declined Friday to elaborate on the rare request. But court observers said the action means the state's highest civil appeals court is deadlocked 4-4 on the appeal of a $3.7 million judgment against Houston Lighting & Power Co.

The Texas Constitution requires a majority of the court—in this case five of the nine members—to decide a case. A court official said the most recent call for appointment of a temporary justice to break a tie was made in the mid-1920's.

James Huffines, Clements' appointments secretary, said the special justice would be named within 10 days.

In a letter sent to Clements last month, Phillips said he disqualified himself from deciding the case because his former

Houston law firm, Baker & Botts, represents HL&P.

"Under the rules, I had to get out," Phillips said Friday.

* * * *

Phillips, a former state district judge in Houston before being appointed chief justice by Clements this year, said rules of judicial procedure that became effective Jan. 1 require him to recuse himself in cases such as this.

Although he did not participate in the defense of HL&P, he was a member of the law firm when the suit was filed, and lawyers with whom he practiced represented the company in court, Phillips said.

[Ver. Exhs. 5]

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; October 17, 1989.

PETITIONER HOWELL'S MOTIONS PRECEDENT TO THE CONSIDERATION OF MOTION FOR DISQUALIFICATION OR RECUSAL

This proceeding is unusual by reason of the fact that the respondent, the Honorable Oscar H. Mauzy, is an incumbent member of this Court. By reason of such fact, the ability of this Court to set aside any natural sympathies in favor of one of its colleagues with whom each member of the Court is in frequent, almost daily contact necessarily becomes a matter of concern. If the law is logic, the relationship between the members of this Court, who must work together continuously, constitutes as great a concern as a remote familial relationship between a judge and an attorney for one

of the parties appearing before the judge. See *Indemnity Insurance v. McGee*, 356 SW2d 666 (TXSM 62).

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, petitioner is entitled to have this original proceedings considered by a Supreme Court that is *entirely* composed of justices who are fair and impartial, both in appearance and in fact. *In re: Murchison*, 349 US 133 (55); *Aetna v. Lavoie*, 475 US 813 (86) (con. ops. Brennan and Blackmun, JJ.).

Petitioner is also entitled, under the Due Process and Equal Protection Clauses of the United States Constitution, to a record that affirmatively reflects that petitioner's federal constitutional rights, aforesaid, have been duly protected.

Petitioner is concerned that one aspect of the law, critical to this case, is unclear with respect to the practice employed by the Supreme Court in the initial consideration of applications for a writ of error.

(1) The Supreme Court has made it plain that the Rule of Four (formerly the "Rule of Three") will ordinarily be applied in deciding if a writ of error will be granted with respect to a particular case.[1]

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[1]Neither through the exercise of the rule making power nor through its opinions has the Supreme Court chosen to define its internal operating procedures to any extent. However, we are able to glean the following information from various texts published during recent years.

(a) Calvert [Ch. J., ret'd, TXSM CT], Application for Writ of Error, APP.PROC.TX, 603,13 (79): "If as many as three judges . . . vote [to do so], the application [for writ of error] is granted."

(b) Greenhill [then Ch. J., TXSM CT], Advocacy in the Supreme Court, 44 TXBJ 624,6 (81): "All of us sit on every application. If three of us are of the tentative view

(2) Putting the matter in slightly different terms, under the established practice of the Supreme Court a case will not be argued and will not be given plenary consideration unless at least four justices affirmatively vote in conference to grant a writ of error thereby according to the complaining party the right of argument and the right of plenary consideration.

(3) Insofar as petitioner and his counsel have been able to determine, this Court requires four affirmative votes in favor of granting the writ no matter how many of the nine justices are absent or fail to vote, whatever the reason of the non-participating justice for failure to vote. *Id.*

(4) It further appears that the "Rule of Four" is employed by the Court in all instances, both with respect to original and appellate proceedings, for the purpose of determining if the petitioning party shall be accorded argument and a plenary hearing. *Id.*

(5) The only authority on the point that petitioner has been able to uncover is Sales, *Original Jurisdiction*, APP.PROC.TX, 3,35-6 (79 ed.) wherein it is stated that:

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that the judgment . . . [below] is wrong, the writ will be granted."

(c) Boyd, Overview of Writ of Error Jurisdiction, 46 TXBJ 892,4 (83): "[I]f as many as three justices are tentatively of the opinion that the court of appeals erred . . ., the application will be granted."

(d) Robertson [then J., TXSM CT] & P., Meaning of NRE, 48 TXBJ 1306, 8 (85): "By court policy of long standing, three votes are sufficient to grant an application for writ of error."

(e) Carlson & G., Discretionary Review, 50 TXBJ 1201,2n.21 (87): "By vote of the members of the Supreme Court, effective in July 1987, four votes are now required to grant an application for writ of error." The principal author is identified as a member of the Supreme Court Advisory Committee and the co-author is identified as a former briefing attorney with the Court. 50 TXBJ at 1207.

(f) See also the exchange of correspondence with the Court's personnel concerning the adoption of the Rule of Four, attached hereto.

> Supreme Court practice requires a majority vote of at least five members of the court to act on a mandamus, and *it serves the relator's interest to have as many judges present as possible* [emphasis added].[2]

(6) If the Supreme Court applies the Rule of Four to mandamus proceedings regardless of the number of justices present and voting, logic would indicate that it follows the same procedure with respect to applications for writ of error.

(7) At the time the Sales article was written, the Rule of Four was a "rule of three" requiring, in effect, three affirmative votes to obtain the grant of an application for writ of error. See n.1.

(8) Ever since this Court has been constituted as a nine justice court, the Texas Constitution has provided that the presence and participation of five justices is necessary in order to constitute a quorum. Therefore, we interpret author Sales as saying:

> A quorum of five justices must be present and voting in order to pass upon a motion for leave to file a petition for mandamus. The same rule of three that applies to applications for writ of error is also applicable to the consideration of motions for leave to file petitions for mandamus. If only five justices are present and voting, you must convince three of the five [or 60%] to vote in your favor in

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[2]The author includes no citation of authority or discussion of the basis for his statement. However, petitioner believes that the author has served as a law clerk or briefing attorney for the Supreme Court. If so, he would be in a position to have personal knowledge of the Supreme Court's practice, at least at the time of his service.

> order to obtain leave to file. However, if all nine are present, you need only convince three of the nine [33 1/3%] to vote in your favor. Therefore, it serves the petitioner's interest to have as many judges present as possible when his motion for leave to file a petition for mandamus is considered.

If petitioner's interpretation of the Sales article is correct, it follows that, under the Rule of Four, as now practiced, if only a bare quorum of five justices are present and voting upon an application for writ of error, petitioner will be burdened to secure an eighty percent vote in his favor in order to obtain the grant of a writ so that he might formally argue his case. If six are present and voting, a two-thirds majority will be required. On the other hand, if nine are present and voting, only a 44% vote will be necessary.

Under such circumstances, if any justice is disqualified or recuses, or if any justice fails to participate and vote upon the said motion for leave for any reason, the Rule of Four effectively penalizes petitioner for the absence or non-participation of any justice. Such procedure, as applied to this petitioner constitutes a discriminatory burden upon this petitioner's right to obtain review from this appellate court in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Unreasoned distinctions upon the right of recourse to the courts offend the Constitution. *Lindsey v. Normet*, 405 US 56(72); *NC v. Pearce*, 395 US 711(69); *Rinaldi v. Yeager*, 384 US 305(66).

In order that the record affirmatively disclose that petitioner's constitutional rights have been protected, petitioner moves that the Court fully disclose and clarify the standard practice that the Court has established in this respect

for the consideration of writ applications. In particular, petitioner asks that the Court make it clear to the bar and to the public whether the Rule of Four is uniformly applied to writ applications, even when one or more justices fails to vote upon the particular application.

Petitioner moves, in order to neutralize the irrationality punitive and discriminatory aspects of the Rule of Four, that the same be adjusted downward for each member of the Court who invokes disqualification or recusal, or who abstains for any reason. That is to say, if only eight justices can be assembled to vote upon petitioner's application, petitioner moves that the Rule of Four be reduced to a Rule of Three requiring only three affirmative votes in order to obtain leave to file. If only seven justices participate, only two affirmative votes should be required. If only six participate, one affirmative vote must suffice. If only five participate, leave to file must be granted as a matter of course.

Alternatively, petitioner moves, insofar as any incumbent justice may fail or refuse to actively participate in the disposition of the writ application, that the court cause the appointment of special justices to pass upon or assist in passing upon petitioner's application for writ of error. In this connection, petitioner moves that the Court follow the procedures employed in *Houston Lighting v. Reynolds*, no. C-5499, wherein a special chief justice was appointed to serve in the stead of Chief Justice Phillips. TXCONST. art. V, §11, GOV.C.§22.005.

Petitioner has filed and the Court has under consideration petitioner's "Motion for Disqualification or Recusal of Certain Justices."

(1) *If* petitioner is correct in his analysis to the

effect that it is the Court's practice to follow the Rule of Four regardless of the number of justices present and voting upon an application for writ of error, *and* if the Court overrules or denies the petitioner's motion for relief from the Rule of Four by reducing the number of affirmative votes necessary to obtain the writ to the extent that any justice fails to participate, *then* petitioner may wish to re-think one or more of his challenges.

(2) Petitioner's conditional analysis is that by virtue of a successful challenge, *he will have irrevocably precluded a challenged justice from voting favorably upon his, petitioner's writ application.*

(3) With this fact in mind, it may be that petitioner, when faced with Hobson's choice (to which he should not be put), may choose to waive at least one perfectly valid challenge. Under a Rule of Four practice that admits to no exceptions, *it could be to the advantage of this petitioner,* or any other petitioner similarly situated, *to waive a perfectly valid challenge, unless the challenger were convinced that he had no hope whatever that the affected justice might vote in favor of petitioner's writ application.*

(4) Restating for emphasis, petitioner urges that he is constitutionally entitled to exclude disqualified justices from the deliberations upon his case. However, insofar as the Rule of Four practice makes a non-vote into the substantial equivalent of a vote to deny the writ, petitioner may, after being fully informed, choose to waive his constitutional right to justices both impartial in appearance and impartial in fact if he feels that a particular justice, even though disqualified, might conceivably be persuaded to vote in petitioner's favor.

(5) It follows that a distinct possibility exists that,

upon receipt of the disclosures requested herein, petitioner will desire to waive his motion for the disqualification or recusal of one or more of the justices of this court. Petitioner moves that he be provided with an opportunity to reconsider his challenge to the capacity and propriety of each of the justices of this Court to sit upon petitioner's application for writ of error. Such opportunity must necessarily occur *after the Court has clarified whether the Rule of Four is applicable* to the vote upon the application for writ of error and *after the Court has ruled upon petitioner's motion for the reduction of the votes to be required* in case of the non-participation of any justice. Petitioner therefore moves that the Court withhold action on the motion for disqualification or recusal and upon the writ application itself until at least 15 days after the Court has ruled upon the matters aforesaid.

Petitioner further moves that the court withhold action until fifteen days after petitioner has been provided the information requested immediately below. Petitioner now moves that each justice disclose to petitioner in writing all relevant information that petitioner might reasonably desire or need to know in determining if he should move for that particular justice's disqualification or recusal herefrom. It is requested that such statements include a disclosure of all business, personal, social and political relationships, especially those within the past five years, of each said justice with respondent Mauzy, and that each said justice might also disclose any personal or political differences that each said justice might have had with petitioner, including each statement or action of petitioner coming to the attention of each such justice, that might reasonably have incurred the upset, annoyance, or animosity of the ordinary and reasonable person being the object of such actions or remarks, and including all other circumstances that might arguably make the impartiality of the respective justices reasonably subject to

question. TXRAP 15a.

As authority for the requested disclosure, petitioner cites *Sun Exploration v. Jackson*, 31 TXSCTJ 604, 7-8 (15JL87). Petitioner recognizes that the Court has ordered *Jackson* to be re-submitted. *Id.* 32 TXSCTJ 191(08FE89). However, until the previous decision of the Court be set aside, it is controlling. Petitioner further relies upon *Liljeberg v. Health Services*, 108 SCT 2194 (88) (Disqualification of federal judge held at least partly attributable to circumstance that he withheld disclosure of fact that his beneficiary was in a position to profit financially from the judge's ruling).

Petitioner's requests are not unreasonable. Within recent years, the Alabama Supreme Court has twice disqualified itself en banc where a member of the court was involved in litigation before the court. *Ex parte AL Power*, 196 So2d 702 (AL 67); *Duncan v. Johnson*, 338 So2d 1343,4n (AL 76). The Supreme Court of West Virginia has done likewise, *Matter of Neely*, 364 SE2d 250 (WV87). The Supreme Court of Arkansas has followed suit in the recent case of *Johnson v. Sturdivant*, 758 SW2d 415 (AR 88). If this Court, or any member thereof, considers the requested disclosures to be burdensome, the appropriate alternative is voluntary withdrawal from the case by the justice or justices desiring not to respond to the motion presented by the within paragraph.

Regardless of the disposition of other parts of this entire pleading, petitioner moves that the Court's order disposing of petitioner's application for writ of error contain an affirmative showing as to the names of the justices present during deliberations on the within pleading, that the vote of each justice upon petitioner's within pleading be disclosed and that petitioner be advised as to the names of each justice who declined to participate in the Court's decision upon the within

pleading in its entirety.

WHEREFORE, premises considered, petitioner moves as follows:

(1) That the Court fully disclose and clarify the practice applicable to the consideration of applications for writ of error, including, in particular, the application of the Court's Rule of Four to such proceedings (See paragraph 7 above).

(2) If petitioner be correct in his conclusion that the grant of a writ requires four affirmative votes without regard to the number of justices actually voting thereon, then, in such instance, petitioner moves that all members of the Court neither disqualified nor subject to mandatory recusation, fully participate in the disposition of the said application. (See paragraph 8 above).

(3) If the Rule of Four is to be applied to the within writ application, then petitioner asks that the requirement of four affirmative votes be reduced for each justice who invokes disqualification or recusal or who abstains for any reason, as set forth in paragraph 8 hereof.

(4) Alternatively, petitioner moves that special justices of this court be appointed to consider the said motion, as set forth in paragraph 9 hereof.

(5) Petitioner moves that the Court withhold action on petitioner's motion for disqualification or recusal on file herein and that he be granted time after the clarification of the Court's practice and the ruling upon petitioner's motion for the reduction of the necessary votes as moved for in paragraphs 7 & 8 hereof, and that petitioner be granted 15

days after the Court's ruling on such matters to reconsider his motion for the disqualification or recusal of each of the justices of this court to sit upon petitioner's application for writ of error, as set forth in paragraph 10 hereof.

(6) Petitioner further moves that the Court withhold action on petitioner's motion for disqualification or recusal, that petitioner first receive disclosure by each participating justice of all circumstances that might arguably make the impartiality of each said justice reasonably subject to question, and that petitioner be provided 15 days after disclosure to move for disqualification or recusal of the respective justices, all as set forth in paragraph 11 hereof.

(7) Petitioner moves that the Court's order disposing of petitioner's within pleading in its entirety contain an affirmative showing as to the justices present during deliberations, the votes for and against petitioner's motion cast by each respective justice, and the names of each justice declining to participate herein.

THE SUPREME COURT OF TEXAS; Charles Ben Howell v Oscar Mauzy, et al.; No. C-9,043; November 15, 1989.

[PETITIONER'S] SUPPLEMENT TO MOTION FOR DISQUALIFICATION OR RECUSAL OF CERTAIN JUSTICES

As shown by the transcript, the briefs, and the opinion of the Court of Appeals, plaintiff sues for statutory double damages, injunction, and attorneys' fees alleging that defendant Oscar Mauzy, during his campaign for election to the bench of the Supreme Court, failed to comply with the Campaign Disclosure Act. Among the reasons that the

aforenamed justices are disqualified, or are alternatively subject to mandatory recusal, is that one or more of the aforenamed justices have themselves filed reports under the Campaign Disclosure Act that reflect certain of the same acts and omissions that this plaintiff has charged against defendant.

A justice of this Court who has engaged in any of the same acts or omissions as have been alleged against defendant could not rule in plaintiff's favor upon the allegations against defendant without making an inferential admission that he, the said justice, has himself failed to comply with the Campaign Disclosure Act. For such reason, the said justice is disqualified or subject to mandatory recusal. In particular, the impartiality of the said justice might reasonably be questioned, the said justice is possessed of a personal bias or prejudice concerning the subject matter of this action, and his personal knowledge or an arguable expert opinion with respect to disputed evidentiary facts concerning this proceeding.

In addition, any justice so situated, in ruling in favor of defendant could, in all likelihood, be acting to insulate himself from liability under the Campaign Disclosure Act for injunctive relief, civil damages, criminal sanctions, attorney's fees and costs. Any justice so situated possesses a direct financial interest in the outcome of the case thereby causing him to be disqualified or subject to mandatory recusal.

Also, any justice so situated, in ruling in favor of defendant would be, in effect, acting in his own case thereby causing him to be disqualified or subject to mandatory recusal.

Furthermore, each of the justices whose campaign disclosure filings are complained of in this supplemental motion has, under oath, executed or caused the execution of each campaign disclosure form here complained of and is well aware of the contents thereof. Each said justice has personal knowledge of the specific allegations of this lawsuit because it has been well publicized, particularly in the City of Austin where this case has been litigated since filing in the District Court below. He also has personal and judicial knowledge of the allegations in this case because the record of proceedings in this case is before him together with the briefs of counsel and the opinion of the Court below. Nevertheless, each said justice has undertaken to preside herein and has refused to withdraw herefrom, and has failed and refused to disclose to the parties that he was possessed of a possible conflict by reason of the manner in which he, the said justice, has personally filed and caused the filing of campaign disclosure reports. The conduct of each said justice in failing to promptly disclose his possible conflict constitutes additional grounds for the disqualification or mandatory recusal of each said justice.

This particular application for writ of error does not reach the merits of the plaintiff's case, but plaintiff is nevertheless entitled to the services of impartial decision makers at each stage of his case. In addition, the dismissal order of the Court of Appeals, which is here being challenged by plaintiff before the Supreme Court has, at a bare minimum, burdened plaintiff with many months of delay and great expense, inclusive of court costs, travel expense, and the fair value of the legal services of plaintiff's attorney, for the representation of plaintiff in an abortive appeal. Even worse, plaintiff has been returned to the trial court under conditions where he has reason to apprehend that he will be subjected to oppressive attorney's fees claims for the appellate services of defendant's attorney, quite possibly making it prohibitively

expensive for plaintiff to prosecute an appeal on the merits. For each said reason, each justice whose campaign disclosures are complained of herein has personal reasons to see the appeal of this case on its merits frustrated or prevented. Any ruling by this Court and its justices in favor of defendant does, in fact, act to frustrate and prevent this case from being appealed on its merits. Each said justice is as much disqualified or subject to mandatory recusation from presiding over this writ application challenging the dismissal of this appeal as he would be disqualified or subject to mandatory recusation from considering an application for writ of error running to the merits.

In the cause of action now before the Supreme Court, plaintiff asserts that defendant Mauzy has violated the Campaign Disclosure Act by reporting the disbursement of campaign contributions to credit card companies without giving the name of the true provider of the goods or services in question, and/or without giving the date that the expenditure was incurred, and/or without stating the nature of the goods or services provided (Tr.246,62-4,ant.br.18).

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Franklin Spears has engaged in the same or similar acts or omissions reporting as follows:

Date Listed	Payee	Purpose	Amount
7-1-85	American Express	Reimbursement of Travel Expense	$ 896.71
8-4-85	American Express	Reimbursement of Expenses	536.16
9-5-85	American Express	Reimbursement of Expenses	693.26

10-1-85	American Express	Reimbursement of Expenses	306.84
10-31-85	American Express	Reimbursement of Expenses	323.69
12-5-85	American Express	Reimbursement of Expenses	209.30
1/12/86	American Express	Reimbursement of Expenses	102.90
2/10/86	American Express	Reimbursement of Expenses	201.63
3/1/86	American Express	Reimbursement of Expenses	178.37
4/8/86	American Express	Reimbursement of Expenses	173.94
5/12/86	American Express	Reimbursement of Expenses-travel	221.30
6/1/86	American Express	Reimbursement of Expenses	255.56
7/11/86	American Express	Reimbursement of Expenses & Travel	1084.58
8/11/86	American Express	A. Bar Convention	878.86
8/14/86	American Express	Travel/judicial seminar—Lake Tahoe	844.27
10/1/86	American Express	Bar meeting & judicial seminar	1416.79
11/19/86	American Express	Travel Lubbock	180.50
12/19/86	American Express	Travel expenses	520.71
1/14/87	American Express	Travel expenses	246.00
2/11/87	American Express	Reimbursement of Expenses	245.45
3/17/87	American Express	travel expenses Airfare	151.30
5/12/87	American Express	travel expense	147.48
6/7/87	American Express	travel expenses	368.54

7/5/87	American Express	Entertainment—Law Students	134.80
9/14/87	American Express	Misc. travel & Entertainment	259.35

Likewise, the Honorable C. L. Ray has engaged in the same alleged acts or omissions as defendant by filing campaign disclosure reports with the Secretary of State listing credit card transactions in the following manner:

Date Listed	**Payee**	**Purpose**	**Amount**
1984-3/1	American Express	Travel, Gas, meals; C. L. Ray	$ 970.05
8/5/87	MasterCard	Entertainment	192.92
9/11/87	MasterCard	Entertainment	160.00
9/29/87	MasterCard	Entertainment	328.00
11/6/87	MasterCard	Entertainment	110.53
11/6/87	American Express	Travel	100.00
11/24/87	Texaco	Gasoline	79.00
12/22/87	American Express	Travel	204.00
12/23/87	MasterCard	Entertainment	87.28

Likewise, the Honorable Raul A. Gonzalez has engaged in the same alleged acts or omissions as defendant by filing campaign disclosure reports with the Secretary of State listing credit card transactions in the following manner:

Date Listed	Payee	Purpose	Amount
[1984] 12-7	American Express	Hotel Exp. to attend Texas Trial Lawyers mtg. Houston	$ 100.15
02/10/86	Republic Bank Card	Campaign Exp. per Jan. stmt.	348.88
03/26/86	Republicbank Card	Travel & Related Expenses as per April Stmt.	3284.12
04/16/86	Republic Bankcard	Mastercard Bill Jan.-Feb.	987.07
05/05/86	Republic Bankcard	Expenses (Mastercard)	2947.35
05/30/86	Republic Bankcard	May bill	2956.70
06/25/86	Republic Bankcard	Bill for 05/20/86-06/17/86	1490.68
08/21/86	Republic Bankcard	Mastercard bill	1014.83
09/10/86	Republic Bankcard	August expenses	1189.65
10/3/86	Republic Bankcard	Compensation for misc. expenses	524.48
10/29/86	Republic Bankcard	travel expenses	461.15
12/23/86	Republic Bankcard	Travel expenses	4041.11
1987-1/31	Republic Bankcard	travel expense	481.73
2/26	Republic Bankcard	travel expense	293.55
4-8-87	Republic Bankcard	travel exp.	265.10

In the cause of action now before the Supreme Court, plaintiff asserts that defendant Mauzy has violated the Campaign Disclosure Act by reporting the disbursement of campaign contributions to himself as purported advances or reimbursements for undisclosed expenditures made or to be made without giving the name of the true provider of the goods or services in question, and/or without giving the date

that the expenditure was incurred, and/or without stating the nature of the goods or services provided (Tr.246,62-4,ant.br.18).

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Franklin Spears has engaged in the same or similar acts or omissions. In this connection, petitioner says that the disbursement of moneys to Rebecca Nell Spears, the wife of the said Honorable Franklin Spears, with whom the said justice shares the same living quarters, maintains joint and common finances, and pools income and living expenses in general is, particularly in this community property state, the equivalent of a disbursement to himself, the said Honorable Franklin Spears. The following items appear on the said reports of the said Honorable Franklin Spears:

Date Listed	Payee	Purpose	Amount
11-19-85	Franklin S. Spears	Reimbursement of Expenses	104.00
12-23-85	Rebecca N. Spears	Reimbursement of Expenses	46.77
2-19-86	Franklin S. Spears	Reimbursement of Expenses	318.07
3-13-86	Rebecca N. Spears	Reimbursement of Expenses	187.72
5-12-86	Franklin S. Spears	Reimbursement of Expenses	263.55
6-10-86	Rebecca N. Spears	Reimbursement of Expenses Travel	65.00
7-11-86	Rebecca N. Spears	Reimbursement of Expenses	47.55
12-10-86	Rebecca N. Spears	Reimbursement of Expenses	36.00

12-18-86	Rebecca N. Spears	Reimbursement of Expenses	270.10
3-2-87	Rebecca N. Spears	Reimbursement of Expenses	169.00
4-22-87	Rebecca N. Spears	travel exp. reimbursement	368.96
6-7-87	Rebecca N. Spears	Reimbursement of Expenses	264.00
9-2-87	Rebecca N. Spears	Reimbursement of Travel Expenses	116.14

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable C. L. Ray has engaged in the same or similar acts or omissions reporting as follows:

Date Listed	Payee	Purpose	Amount
[1983] 3/3	C. L. Ray	Reimbursement of Expenses	668.55
4/20	C. L. Ray	Reimbursement of Expenses	1264.39
6/16	C. L. Ray	Reimbursement of Expenses	755.04
8/8	C. L. Ray	Reimbursement of Expenses	795.61
8/31	C. L. Ray	Reimbursement of Expenses	2675.15
10/12	C. L. Ray	Reimbursement of Expenses	1528.39
12/5	C. L. Ray	Reimbursement of Expenses	1298.18
2/15	C. L. Ray	Reception Expenses	50.00

3/15	C. L. Ray	Expenses: meals, gas, travel	871.00
3/30	C. L. Ray	Reimbursement of Expenses	994.35
5/7	Judge C. L. Ray	Reimbursement of Expenses	800.00
4/30	Judge C. L. Ray	Reimbursement of Expenses	1071.61
6/11	C. L. Ray	Reimbursement of Expenses	2397.69
84/07/03	C. L. Ray	Int. Withdrawl	2500.00
84/08/01	C. L. Ray	Reimb. Travel Exp.	5273.13
84/11/26	C. L. Ray	Reimb. Expenses	1733.17
1985-1/24	C. L. Ray	Reimb. Expenses	1697.16
3/4	C. L. Ray	Reimb. Expenses	1620.62
4/26	C. L. Ray	Reimb. Expenses	2550.31
8/5/87	C. L. Ray	Reimb. Expenses	34.00
9/28/87	C. L. Ray	Reimb. Expenses	108.00
9/29/87	C. L. Ray	Reimb. Expenses	26.50
10/23/87	C. L. Ray	Reimb. Expenses	101.67
11/4/87	C. L. Ray	Reimb. Expenses	66.67
09/21/88	C. L. Ray	Travel Expense	300.00

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Raul A. Gonzalez has engaged in the same or similar acts or omissions reporting as follows:

Date Listed	**Payee**	**Purpose**	**Amount**
12-10-84	Raul A. Gonzalez	Hotel, parking, air transportation, cab in Houston	$ 206.94

12-14-84	Raul A. Gonzalez	Hotel and taxi Houston for TTLA Board meeting; Air shipping exp.	138.15
1-31-85	Raul A. Gonzalez	Postage; car rentals cab fares; hotels	293.48
3-6-85	Raul A. Gonzalez	Hotel; meals; auto exp. for trip to Laredo	428.72
3-19-85	Raul A. Gonzalez	Hotel; mileage to Bay City	138.88
4-10-85	Raul A. Gonzalez	Mileage to Hebbronville, San Antonio & Ingleside; postage; parking	331.09
6-4-85	Raul A. Gonzalez	Parking; meals; hotel in San Angelo	70.00
6-21-85	Raul A. Gonzalez	Hotel & meals in Nacogdoches; Hotel, parking & meals in Houston; hotel & meals in Corpus Christi	590.87
9/20/85	Judge Raul Gonzalez	Reimbursement of Expenses	217.01
10/28/85	Judge Raul Gonzalez	Reim. airport parking/mileage	55.50
11/26/85	Judge Raul Gonzalez	Reimb per 11-22-85 memo	476.90
12/11/85	Judge Raul Gonzalez	Reimb. per 12-10-85 memo	192.87
12/17/85	Judge Raul Gonzalez	Reimb. per 12/13/85 memo	96.53
3/10/86	Raul Gonzalez	Reimb. for exp.	116.93
04/11/86	Fund Raising		1190.00

03/26/86	Raul A. Gonzalez	Reimb. for expenses	$53.66
04/15/86	Raul A. Gonzalez	Reimb. for food parking exp.	$88.88
05/13/86	Judge Raul Gonzalez	Out of pocket expenses	228.40
07/29/86	Raul Gonzalez	Miscellaneous expenses	91.15
09/04/86	Committee to Keep Justice Gonzalez	Allied Bank Acct. in Austin Petty Cash	1000.00
09/22/86	Raul A. Gonzalez	Miscellaneous travel expenses	58.27
10/3/86	Raul Gonzalez	Misc. Comp. expenses	143.03
11-19	Raul A. Gonzalez	Reimburse for travel expenses	178.15

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Lloyd Doggett has engaged in the same or similar acts or omissions. In this connection, petitioner says that the disbursement to Doggett and Jacks, a law partnership, in which the Honorable Lloyd Doggett, at such time shared the receipts and assisted in controlling the operations and financial benefits, was the equivalent of a disbursement to himself. The following items appear on the reports of the Honorable Lloyd Doggett:

Date Listed	**Payee**	**Purpose**	**Amount**
1980—7/29	Senator Lloyd Doggett	Expenses for San Antonio event	68.85
9/16/82	Lloyd Doggett	State Democratic convention expense	161.75

1983–6/29	DOGGETT & JACKS	Reimbursement of expense	20,907.62
12/31/84	LLOYD DOGGETT	Reimbursement for Christmas dinner and thank yous	1058.57

In the cause of action now before the Supreme Court, plaintiff asserts that defendant Mauzy has violated the Campaign Disclosure Act by engaging in the questionable practice known as "pocketing" whereby a candidate or officeholder diverts political contributions to his own use and benefit and expends the same for personal purposes. Among the defendant's pocketing transactions that have been challenged by plaintiff is the alleged payment by defendant of the expenses of moving his household goods and personal effects to Austin around August 1986 (Tr. 246,63,ant.br.18-9).

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable C. L. Ray has engaged in the same or similar acts or omissions reporting as follows:

Date Listed	Payee	Purpose	Amount
7/5/87	C. L. Ray	Withdrawal of Pre 1983 Funds used for daughter's medical expenses	4,229.94

In this connection, petitioner would show that the designation of the expenditure as being "Pre 1983 Funds" is subject to question in that the said sworn reports of the Honorable C. L. Ray only show the total amount of $3,565.80 in unexpended funds on hand at December 31, 1983. A deficit of $4,136.86 was reported at June 30, 1984 and a deficit of

$27,267.27 was reported at December 31, 1984. In addition, the said Honorable C. L. Ray has wholly failed to file a report with the Secretary of State which, under oath, details his political contributions and expenditures during the period beginning July 1, 1988 and ending October 30, 1988.

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Raul A. Gonzalez has engaged in the same or similar acts or omissions as defendant, the said Honorable Raul A. Gonzalez reporting as follows:

Date Listed	Payee	Purpose	Amount
2-11-85	Raul A. Gonzalez	3 months apartment rent, Austin, Texas	1350.00
2-11-85	C. C. Transfer Co.	Move from Portland to Austin	2771.08

By his sworn campaign disclosure statements filed with the Secretary of State of Texas, the Honorable Lloyd Doggett has engaged in the same or similar acts or omissions as defendant, the said Honorable Lloyd Doggett reporting as follows:

Date Listed	Payee	Purpose	Amount
[1983] 8/23	LLOYD DOGGETT US SENATE CAMPAIGN P. O. Box 1222 Austin, TX 78767	Transfer of funds	123,328.28

[1983] 9/22	LLOYD DOGGETT US SENATE CAMPAIGN P. O. Box 1222 Austin, TX 78767	Transfer of earned interest 5-24 to 6-24-83	1,300.26
[1983] 12/30	LLOYD DOGGETT US SENATE CAMPAIGN P. O. Box 1222 Austin, TX 78767	Transfer of funds	36,691.48
[1983] 12/30	LLOYD DOGGETT US SENATE CAMPAIGN P. O. Box 1222 Austin, TX 78767	Transfer of interest 7-1 to 12-31-83	3,603.18

The sworn reports of the following justices further illustrate the close personal, social and working relationship between the respective justices and the defendant which prevents the plaintiff from obtaining a fair and impartial hearing in this case, as follows:

Disbursed by the Honorable Franklin Spears-

12-29-88	Oscar Mauzy	Reimbursement for court photo expense	$ 13.00

Contributions to the Honorable C. L. Ray-

11/14/83	Senator & Mrs. Oscar Mauzy	100.00

04/04/84	Senator & Mrs. Oscar Mauzy		100.00

Disbursed by the Honorable Lloyd Doggett-

12/30/82	Senate Ladies Club	Presession Dinner c/o Ann Mauzy Rm. 129 Capitol Office Bldg. Austin, TX 78711	320.00
1/7/83	Senate Ladies Club	Tickets for ball c/o Ann Mauzy Capitol Bldg. P O Box 12068 Austin, TX 72711	$200.00

WHEREFORE, for each reason given herein and each reason heretofore given, petitioner would show that the said justices herein and heretofore named should each of them be disqualified or mandatorily recused from participating in the within writ of error proceedings and that petitioner should have relief as requested heretofore.

OTHER PROCEEDINGS

THE SUPREME COURT OF TEXAS; Miscellaneous Order; Undated (issued approximately the first week of February 1988, per letter from clerk).

Notice

The Supreme Court of Texas gives notice that,

effective January 15, 1988, the affirmative vote of four (4) Justices will be required to grant an application for writ of error.